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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m s LEMBULUS,
Petitioner,

v.

CHARLES PESCHKEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (Appendix A of Petition) is reported at 184 F. Supp. 950 (D. C. N. J. 1960). The opinion of the District Court denying motion for judgment in favor of respondent, Charles Peschken, notwithstanding the Court's opinion (Appendix B of Petition) has not been officially reported. The opinion of the Court of Appeals for the Third Circuit (Appendix C of Petition) is reported at 290 F. 2d 685 (1961).

Jurisdiction

The jurisdictional basis for the petition is 28 U.S.C. 1254 (1); however, petitioners do not satisfy the considerations necessary for the grant of a writ of certiorari by this court as set forth in Rule 19 (1b), in that the decision of the Circuit Court is correct, is in keeping with the decisions of this court and other circuit courts of appeals, and does not concern new and important principles which require this court's supervision.

Counter-Questions Presented

1. Does the decision of the Court of Appeals, holding that the vessel in question was negligent in continuing to approach the bridge despite the clear warning signal given by the bridge, conflict with the decisions of the Courts of Appeals of other circuits or of the Supreme Court of the United States?

2. Can the result below be sustained on various grounds, including the ground that the vessel's excessive speed was the cause of the accident, and, therefore, the points raised by petitioner would not alter the result on an appeal to this court?

Statute and Regulation Involved

33 U.S.C., §499.
33 C.F.R. 203.200 (1949).

Counter-Statement of the Case

On December 20, 1957 the vessel "Lembulus", owned by libellant, the Shell Petroleum Co., Ltd., sailed down the narrow and winding Hackensack River and ran into the Lincoln Highway Bridge. At the time of the collision the bridge was in the process of opening. Appellant, Charles Peschken, an employee of the New Jersey State Highway Department, was the Chief Drawbridge Operator of the bridge.

Libellant sued Peschken, as well as Canolius V. Hines, the gate attendant and Fred W. Bents, a bridge attendant, for damages to the vessel. Suit was not brought against the New Jersey State Highway Department, the owner of the bridge, presumably because of sovereign immunity of the State of New Jersey.

After trial and the submission of briefs by the parties, the lower court rendered a 17-page decision and opinion. The libel against Hines and Bents was dismissed by the lower court on the finding that there is "in the evidence no basis for concluding that any act or omission on the part of or chargeable to Hines or Bents contributed in the causation of the collision". No appeal was taken by libellant from the dismissal as to Hines and Bents.

The decision and opinion of the lower court found that Peschken, the bridge operator, was solely negligent and liable for the damages to the vessel. The Court found that the libellant, the owner and operator of the vessel, was not in the slightest degree liable or negligent or contributorily negligent, nothwithstanding that the vessel proceeded in violation of a two-blast signal from the bridge warning of possible delay in opening. The trial court held that in commencing to open the bridge after giving the two-blast signal, the bridge-tender countered the effect of the warning signal and invited the vessel to come ahead. The trial court expressed this novel rule of navigation as follows:

> "I find that by commencing the raising of the draw span immediately following his 'warning' signal, the physical raising of the bridge countered the effect of such warning, and served as an invitation to the vessel to proceed. See *Clement* and *The Kard*, *supra*. I can therefore find no basis for concluding that the vessel contributed in bringing about the collision, and am unable to relieve the drawbridge operator of responsibility for the occurrence." (Pb42)

The facts as found by the Court below show that the vessel signaled for the opening of the drawbridge by three blasts of its whistle. 33 C.F.R. 203.200 (d). The trial court further found that:

> "This signal was acknowledged by the Highway bridge, by two blasts of its horn (the prescribed warning of delay in opening the draw), but the draw span of the bridge nevertheless commenced to raise almost immediately." (Pb30)

There was testimony by the bridge tender and others that a second two-blast warning signal was given by the bridge. But, notwithstanding the warning signal from the bridge, the ship continued moving in a forward direction toward the bridge, and at an excessively high rate of speed. The bridge meanwhile continued to open slowly because mechanical difficulty was sometimes encountered when opening at high speeds. The District Court was not certain whether the bridge draw span actually stopped in its ascent or whether it simply slowed in speed. It indicated, however, that:

> "* * * when the draw section stopped in its ascent, or slowed to a point at which it appeared to have stopped, the bow of the vessel was then approximately her length away from the bridge abutment, and shaped for passing through the draw, at which time it first became apparent to her Captain that the top masts would not clear. Whether, therefore, the bridge draw span had actually stopped, or whether it had but slowed to an almost imperceptible speed, it was then too late for the vessel to avoid the collision, despite stopping her engines and then reversing their revolutions." (Pb41)

When it became apparent to the captain that a collision was imminent, the ship's engines were stopped and ordered

to full astern. They were going full astern when the collision ensued.

After the trial court's decision a motion was made by Peschken seeking (a) judgment in his favor notwithstanding the findings of fact and conclusions of law in the court's written opinion, (b) an order setting aside the findings of fact and conclusions of law in favor of libellant and against respondent, Peschken, on the grounds that the same were contrary to law, contrary to the evidence, contrary to the greater weight of the evidence and clearly erroneous in numerous material respects; or (c) in the alternative, if judgment is not entered in favor of all respondents, an order granting a new trial in view of the erroneous findings of fact and the finding of liability made by the trial court partly based on a theory regarding the use of alternate controls on the bridge, a basis of liability which was not fairly litigated and as to which there is insufficient evidence in the record to support a conclusion of negligence. In the motion, Peschken also requested that the court take judicial notice of certain records of the Coast and Geodetic Survey of the United States Department of Commerce, excerpts from which are contained in the letters annexed to the motion. These records pertain to the tide in the Hackensack River at the time of the collision. They indicate that it was "slack water" at the Lincoln Highway Bridge at the time of the accident. The tide was just beginning to change from low water to an incoming tide.

After oral argument, and additional briefs submitted by the parties, the trial court wrote a letter opinion modifying in some significant respects its earlier opinion. The trial court reaffirmed, nevertheless, the finding of liability against Peschken and the lack of liability, negligence or contributory negligence on the part of libellant based upon one theory: commencing to open the draw-span after giving the warning signal countered the signal and invited

the vessel to come on. From the decree entering judgment against Peschken and the denial of the aforesaid motion an appeal was taken to the Court of Appeals for the Third Circuit.

The Court of Appeals held that the ship was clearly at fault for approaching the bridge in the face of a warning signal properly given in accordance with controlling Federal regulations promulgated by the Secretary of the Army. The trial court's decision was reversed.

The basis for this holding was that the vessel was negligent in continuing to approach the bridge in the face of a two-blast signal warning of delay in opening the draw sufficient to allow passage of the vessel. The Court also indicated, however, that although the rule of *The Pennsylvania,* 86 U. S. 125 (1873) need not be invoked to decide the case before it, if the ship's failure to obey the signal contributed to the collision, *The Pennsylvania* rule also would bar recovery by her.

In deciding the case below, the Court of Appeals did so purely as a matter of law, accepting for the purpose of its decision the essential facts found by the trial court, namely, (a) that the vessel gave three blasts of her whistle while in the vicinity of the Pulaski Skyway, just north of the Lincoln Highway Bridge, (b) that the vessel's signal was answered by two blasts from the bridge (which signal may have been repeated), (c) that those in charge immediately began the process of opening the draw, (d) that no three blast signal was given to the vessel ("which would have indicated to the ship that she could come ahead"), (e) that thereafter the bridge mechanism either stopped or slowed down so that the draw was not fully opened at the time the vessel reached the bridge, and (f) the collision of the vessel's masts with the draw-span then occurred. 290 F. 2d at 686.

The court then decided the case after citing the applicable rule of the Secretary of the Army, 33 C. F. R. 203.200 (1949), saying (290 F. 2d at 687):

> "The Lembulus disobeyed the rule as is readily apparent from the statement of facts given above and reading the command set out in the rule. She signaled properly in approaching the bridge. But the bridge responded with the caution signal and under the rules that is the effective signal until removed by a three-blast signal from the bridge. It appears from the evidence that there had been some difficulty with the mechanism of the draw raising apparatus. The two-blast signal was quite proper under those circumstances and had it been obeyed the collision would not have occurred."

Now, in seeking a writ of certiorari, petitioner argues a new principle of law, one not applied by the trial court or the Court of Appeals (or by any other court to our knowledge). This principle is that the constant use of the two-blast signal by the bridge permits the vessel to ignore the warning or delay significance given that signal by the regulations of the Secretary of the Army and permits the vessel to come ahead as if a three-blast signal had been given or as if no warning delay signal had been given.

But this principle of law would itself violate the controlling Army regulations. Moreover it would seek to establish liability on principles of negligence law which would in turn require findings of fact not made by the trial court. The theory, if applicable at all, would require proof that the persons in charge of the vessel knew that the bridge would open properly, that no possibility of delay existed, that the two-blast signal was always given even in cases where there was no possibility of delay, and, relying on all these facts, the operators of the vessel then though it safe

to disregard the two-blast signal. Such findings of fact were not made by the trial court. They could not be made because no evidence was introduced to support this theory; it was not even argued in the trial court. The pilot of the vessel was not alive at the time of the trial, so his knowledge on this subject was unknown. Moreover, he may very well have known that the bridge was having difficulty with its opening mechanism and had stopped previously. Therefore, we can just as easily infer that he knew of the possible delay in opening the draw and that the two-blast warning signal was properly given by the bridge.

As a matter of fact, petitioner contended below in its brief that (a) the two blasts given by the bridge were not two *long* blasts (Petitioner's brief below, p. 27), (b) that, "we doubt, however, that any blasts were given at all"* (Petitioner's brief below, p. 27), (c) that Captain Hawkins, the vessel's master, "shouldn't be expected to know" whether the bridge tender gave a two-blast or a three-blast signal because Captain Hawkins is a "deep sea" Master, "who cannot be expected to know local regulations (Petitioner's brief below, p. 26).** It is strange that petitioner should now urge a principle of law based upon facts which petitioner denied below, namely, that a two-blast signal was actually given but that the operators of the vessel knew that such a signal was customarily given, that it could be disregarded, and that there were no delays that might occur in raising the bridge.

It is noteworthy that Captain Hawkins never *testified* that the signal from the bridge was other than a two-

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* Note, however, that Captain Hawkins testified that his signal was answered by the bridge (Pb66).

** The voyage on December 20, 1957 was Captain Hawkins first trip on the Hackensack River, as brought out early in cross-examination (R11a).

blast signal. He merely said that "the bridge answered our signal." This is quoted in the trial court's opinion (Pb34); 184 F. Supp. at 954. No witness denied that the bridge gave a two-blast signal, but many witnesses affirmed this fact. However, there was no evidence that a three-blast signal was given at any time to invite the vessel ahead; in fact, Peschken in depositions denied giving a three-blast signal to the Lembulus (R31a).

There are two additional and essential facts worth noting which, however, were not necessary to the decision of the Court of Appeals. These two facts are: (a) that the vessel was traveling at an excessive speed down a narrow river at the time of the collision, and (b) that the bridge span did not actually stop. The evidence overwhelmingly demonstrates the truth of these two assertions of fact. Some of the evidence on these two points will be detailed in Point IV below.

The trial court found that the average speed of the vessel's approach to the bridge was 7.33 knots (Pb32) which is an extremely high speed on a narrow river. The trial court's opinion recognizes that the Master of the Lembulus, Captain Hawkins, "admitted that her average speed between the Skyway and the Lincoln Highway bridges was 9 knots" (Pb32). Captain Hawkins actually testified that his speed prior to the accident was 9 or more knots at a time when only 3.42 knots was necessary to maintain steerageway on the river. His testimony on this point is as follows:

> "Q. And from the position north of the Skyway to the position before the Lincoln Highway bridge, you were doing nine knots? A. Yes.
>
> Q. And a vessel of this size maintains steerageway at this speed for a distance of a mile? A. At what speed?

Q. At the 3.42 knots? A. Yes.

Q. Did you testify before that to maintain speed it had to be about four and a half or five knots to keep its steerageway? A. Yes.

Q. Can you do it at 3.42 knots? A. The point at issue here is—

Q. Please answer my question.

The Court: Can you do it at that speed?

A. Yes.

Q. At 3.42 knots instead of, as you testified before, (122) at five knots, four and a half to five knots, to maintain steerage? A. Yes."

At the trial, Captain Hawkins gave no explanation for putting his unloaded vessel at full-steam-ahead for six minutes, from 1547½ to 1553½, before reaching the Pulaski Skyway and for attaining a speed which he admitted was "almost the speed you would do in the open ocean" (R24a). This, in fact, was an essential cause of the accident, in addition to disregarding the bridge's two-blast signal. For there is no required speed for opening the bridge-span. The bridge may properly be slow moving or its opening may be delayed to traffic or other conditions. But once given a warning signal the vessel cannot continue to race at the opening draw-span. The vessel can and must slow its speed or go astern, if necessary. The bridge cannot move out of the way of a speeding vessel, but the vessel can, and must, slow its speed to afford the bridge time enough to open, after a warning of delay has been sounded.

As for the fact that the bridge span did not, in fact, stop during its ascent, as the evidence overwhelmingly demonstrates, this is an additional ground for putting the sole liability upon the vessel. The draw-span kept opening, although slowly as compared to the speed of the vessel. The vessel simply arrived too soon. Under these circumstances the vessel would be at fault even if it had been invited ahead by a three-blast signal from the bridge.

Lastly, the unreliability of petitioner's evidence (the numerous conflicts in Captain Hawkins' testimony, in the vessel's records, the alterations in the vessel's records, the failure to call but two weak witnesses) requires a denial of petitioner's claim. Petitioner failed to carry its burden of proof in the trial court. And, as noted above, petitioner offered no evidence whatsoever to support the argument now advanced on this appeal: that the vessel's operators were justified in ignoring the two-blast warning signal from the bridge.

ARGUMENT

POINT I

The decision below is clearly correct.

The Bridge Act of 1906, 33 U.S.C., §499, authorizes the Secretary of the Army to promulgate rules and regulations for the opening of drawbridges and the passage of vessels, which rules and regulations have the force of law. Pursuant to this statute, rules and regulations have been promulgated by the Secretary of the Army for the operation of the Lincoln Highway Bridge and are to be found at 33 C.F.R. 203.200. The applicability of the statute above cited and of the regulation promulgated in accordance therewith to the fact situation in the instant case has been recognized by both the District Court and by the Court of Appeals. In fact, counsel for both parties so stipulated that the Federal regulations were controlling and called for a two-blast warning signal in case of delay in opening the bridge (R54a).*

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* "Mr. McCarter: Of course, I think I can also concede—I don't want to make a big argument out of nothing here—I think I can concede safely that the rule with reference (278) to the use

(Continued on following page)

The controlling regulations provide that when a ship approaches a drawbridge spanning the Hackensack River it shall sound a signal signifying her intention to pass the bridge by three blasts of a whistle or horn. If the draw may be opened promptly, the bridge shall answer with three blasts of a whistle or horn. "In case of delay in opening the draw, * * * as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw." 33 C.F.R. 203.200(d) (Pb4).

Mention was also made in the District Court's opinion of regulations promulgated by the New Jersey State Highway Department for the operation of the drawbridge. These regulations, it was pointed out, require the repetition of the two-blast signal at intervals until the draw can be moved if the opening will be delayed abnormally. Naturally, such State regulations are valid only "so far as they are reasonable and do not conflict with any law of Congress regulating commerce or with the general admiralty jurisdiction conferred upon the courts of the United States". *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 F. 271 (7th Cir. 1903).

(Continued from preceding page)

of two blasts as a warning signal, which was referred to by Mr. D'Auria, was, in fact, the rule in effect on the date of this collision. I don't think there is any question about that. I think that is the only important part of this.

Mr. D'Auria: That's right.

The Court: Are you willing to so stipulate?

Mr. McCarter: I'll stipulate that.

The Court: That in case of difficulty with the bridge lift—

Mr. D'Auria: Case of delay, your Honor.

The Court: In case of delay in getting the bridge open, a two-blast warning signal is to be given by the bridge tender.

Mr. D'Auria: That's right."

The Court of Appeals, in analyzing the fact situation, found that the disobedience of the federal regulations by the Lembulus in continuing to approach the bridge in the face of the caution signal sounded by the bridge, and before that signal was removed by the three-blast signal, was "the substantial cause of the collision".

The two-blast signal, we submit, has been construed as setting forth an absolute direction to the approaching vessel to stop. In *Linde-Griffith Construction Co.* v. *The Authentic*, 210 F. 2d 757 (2d C. A. 1954), the court stated at 758:

> "The tender of the Susquehanna bridge answered with two blasts *to forbid the nearer approach of the tug and tow* because rail traffic was using that bridge." (Emphasis added.)

33 C.F.R. 203.200 (1949) declares that the effect of the signal continues "*in all cases*" until such time as it is possible to open the draw and "a signal of three blasts * * * shall be given * * *". (Emphasis added.)

It is obvious that "possible *to open* the draw" must refer to a sufficient opening to permit complete clearance of the vessel. To require that a signal be given to a ship to proceed when, for example, the power of the mechanism to open the draw is limited to less than a full opening is to invite disaster. Only when the draw may be properly and fully opened is such a signal authorized.

We agree with the statement in the trial court's opinion (Pb36), that the "duty of the bridge operator to signal if the draw cannot be opened at all is the same as that required if the draw cannot be opened sufficiently to permit the vessel's passage without contact therewith." *See: The Kard*, 38 F. 2d 844 (D. C. Pa. 1930). We also agree with the court's citation of the controlling principles of law as stated in *Clement* v. *Metropolitan Westside Elevated Rail-*

way Co., 123 Fed. 271, 273 (7th Cir. 1903) and repeated in *Munroe* v. *City of Chicago*, 194 Fed. 936, 940 (7th Cir. 1912), as follows:

> "If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), *but may carefully proceed at slow speed* upon the assumption that the bridge will open in response to the signal, *and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened* (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), *when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern.*" (Emphasis added.)

Unfortunately the trial court failed to apply these principles of law to the case at bar. The court modified the rule so as to allow the vessel, in effect, an option to heed the warning signal or to accept the commencement in the opening of the draw as the equivalent of a three-blast signal to come ahead. We submit that the regulation does not give this discretion to the vessel. It is the bridge tender who must decide when to blow the three-blast signal for the vessel to come ahead. It is the bridge tender who must determine whether the draw is to be opened immediately, whether there will be delay in (fully) opening the draw be-

cause of traffic conditions, accident to the machinery or other contingency. The bridge tender cannot create a signal system of his own. Nor can the vessel. The vessel cannot deprive the bridge tender of the right to determine when to give the three-blast signal and to determine when it is safe to invite the vessel to proceed.

Our courts have long recognized the need for maintaining an undeviating procedure in a system of nautical signals. Speaking to this question, the United States Supreme Court in *The Pennsylvania*, 86 U. S. 125, 135-7 (1873) said:

> "In the case of *The Emporer*, it was said: 'It is not advisable to allow these important regulations to be satisfied by equivalents, or by anything less than a close and literal adherence to what they prescribe.' * * *
>
> "To go into the inquiry whether the legislature was not in error—whether, in fact, a bell did not give notice to the steamer that the bark was where she was as soon as a foghorn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power. It would be admitting the validity of an equivalent for that which the statute has made a positive requirement."

Thus, the holding of the Court of Appeals is consistent with long-established case-law on the subject. Navigation rules regarding signals must be strictly applied.

In 1885, Judge Brown, speaking in *The Nereus*, 23 F. 448 (D. C., S. N. N. Y. 1885) declared:

> "In a crowded harbor * * * the use of signals is indispensable. They constitute a language by which navigation is controlled. They are one of the chief means adopted in order to avoid collisions. Necessarily they control and supersede in some degree the general rules applicable in the absence of signals; and considering what is at stake in life and property, it is manifest that

> due care, attention and skill are as necessary in the use of signals as in the use of the helm, engine or sails; and any negligence as to the former is as perilous and as blameable as negligence in regard to the latter."

In a narrow, winding river, as in a crowded harbor, the opportunity to maneuver is limited. To disregard controlling signals is negligence *per se*, as a matter of fact as well as law.

In the *Conners Marine Co.* v. *N. Y. and Long Branch R. R. Co.*, 87 F. Supp. 132, 134 (D. C. N. J. 1950) the court states that, "it would seem logical that where a moving vessel collides with a drawbridge there is a presumption of negligence on the part of the vessel. *Arlington Ry. Bridge Co.* v. *Franco-Ottoman Shipping Co.*, 4 Cir. 1919, 259 F. 166." This proposition of law supports our statement that to depart from warning signals and to rely on implications and invitations through other conduct will create confusion. It would place an impossible burden upon the bridge. The bridge cannot move out of the way of an oncoming vessel. Attempting to open the draw-span as much as possible seems the safest course for a bridge operator to take after a warning signal is given to a vessel. In fact, Peschken was limited in his actions and his vision. Upon receiving notice of the approach of the vessel he gave the warning signal. He could do nothing else. From the position in which he operated the bridge, because of the superstructure of the bridge, he could not even see the vessel approaching (R59a). Nor can Peschken, the bridgetender, be held liable for defects in the lifting mechanism or other design of the bridge. He is not the owner of the bridge; he is not responsible for its design, its maintenance or repairs. He can merely open the bridge and warn vessels of the possibility of delay in opening. Surely, then, he should not be held liable when he gave the proper warning signal, and it was ignored by the vessel.

POINT II

The decision by the Court of Appeals for the Third Circuit is not in conflict with the decisions of the Courts of Appeals of the United States.

A. The cases relating to a failure to exchange proper signals support the holding of the Circuit Court.

The findings of fact of the trial court as affirmed by the Court of Appeals showed that the bridge sounded a two-blast warning signal (in conformity with applicable Federal regulation) in response to the approach signal sounded by the vessel. Despite this warning, the trial court found as a matter of law that the slow ascent of the drawbridge constituted an invitation to the vessel to approach. The trial court referred to five cases dealing with signal situations: *The Kard*, 38 F. 2. 844 (D. C. Pa. 1930); *Clement* v. *Metropolitan West Side El. Ry. Co., supra; Munroe* v. *City of Chicago*, 194 F. 936 (7th Cir. 1912); *Conners Marine Co.* v. *New York & Long Branch Railroad Co.*, 87 F. Supp. 132 (D. C. N. J. 1950); *The Louise Rugge*, 239 F. 468 (3rd Cir. 1919). These cases are all distinguishable on their facts from the case at bar.

In reversing the trial court, the Circuit Court of Appeals said:

> "The court (below) relies on several cases where it has been said that in the absence of warning to the contrary a ship approaching a bridge may assume the bridge will be open when it arrives. Those cases are completely reconcilable with our conclusion here. Peschken, operating the Lincoln Highway Bridge, did give the warning signal. Perhaps he gave it twice. And no three-blast 'come ahead' was given." (Pb50)

Counsel for petitioner now presents to this court four of the foregoing cases together with three new cases to

show that the opinion of the Court of Appeals is inconsistent with decisions of other circuits.

Petitioner's argument may be divided into two categories. Petitioner cites two cases for the proposition that the Court of Appeals for the Third Circuit, in addition to reversing the District Court, has also overruled two prior opinions of district courts in the Third Circuit (Pb21). The decisions petitioner fears have been overruled are *The Kard, supra* and *Conners Marine Co.* v. *New York & Long Branch Railroad Co., supra.* No reasoning is set forth to show the alleged overruling by the Third Circuit Court. Petitioner's contention is easily exposed. Both *The Kard* and *Conners* involved the total failure of a bridge tender to give a warning signal to an approaching vessel. In *The Kard,* the trial court found that the opening of the drawbridge without more in the way of a signal was an invitation to the vessel to enter. In the *Conners* case, the bridge's liability was predicated upon the "failure to signal and the delay in opening the draw * * *." (At 135.) The basis for these decisions was evident to the Court of Appeals. That court distinguished them as falling within that class of cases in which a ship has approached a bridge *in the absence of a warning.*

The second category of cases cited by counsel are what we may term the "red light" cases. In this category, we list the *Munroe* and *Clement* decisions cited *supra,* together with *The Majestic,* 80 F. 2d 879 (4th Cir. 1936); *City of Chicago* v. *Chicago Transp. Co.,* 222 F. 238 (7th Cir. 1915); and *City of Cleveland* v. *McIver,* 109 F. 2d 69 (6th Cir. 1940). Petitioner predicates his justification for the use of these cases upon his assertions that "The Court of Appeals' decision in this case was based solely on the exchange of whistle signals" (Pb15) and that the holdings in the cases cited indicate in each case the presence of a red light or red ball signal acting as a check upon the approaching vessel. In other words, counsel states, when

the vessel in each of the cited cases approached the bridge in the face of the red light or red ball displayed, it was advancing in the face of a warning not to proceed and, despite the presence of this warning, the bridge was held liable for the ensuing collision. It is inexcusable for petitioner's counsel to imply that the red light or red ball displayed constituted a warning signal *in the face of expressed pronouncements of the courts to the contrary* in those very cases.

The "red light" cases should be examined briefly to demonstrate the inappropriate manner in which they have been presented to this Court.

1. *The Majestic*, 80 F. 2d 879 (4th Cir. 1936). This is a libel *in rem* by the owners of the barge Majestic against the motor tug C-O to recover for damages sustained by the barge as a result of a collision between the barge then in tow of the tug and the drawbridge over the C & D Canal. The bridge is owned and operated by the United States. The rules and regulations governing the navigation of the canal were promulgated by the Secretary of War. In pertinent part they provide for a three-blast signal from the ship notifying the bridge tender of the desire to pass the bridge, which signal must be answered from the bridge by two blasts as a warning that the bridge may not be opened, or by three blasts when the bridge is clear to open. The bridge also showed navigation lights at the center of the vertical lift draw span which were red when the draw span was closed to navigation and green when it was open. When the vessels were about 2,000 feet from the bridge, the master of the tug gave a three-blast signal indicating that he desired to pass through the draw. At that time a red light was showing on the bridge. There was no response to his signal, the bridge did not open, and the red light remained fixed. The bridge tender could not raise the bridge because the mechanism was frozen.

"But he gave no notice of this difficulty until the flotilla was too close to be stopped" (at p. 880). Then he sounded the danger signal of two blasts and called out that he could not raise the draw; but it was too late and the barge drifted ahead of the tug and came into contact with the bridge. The Court indicated that the tug might have stopped when within 1,000 feet of the bridge and so held the barge in check against the tide, "but the master of the tug did not consider that there was any danger because he had received no notice from the bridge to stop * * *" (at p. 880).

The Court below held that the accident was caused solely by the negligence of the bridge tender without negligence on the part of the master of the tug. The Appellate Court affirmed and concurred, citing the rule of *Clement* v. *Metropolitan West Side El. Ry. Co., supra,* in which it was said that if for any reason a bridge cannot be opened, it is the duty of the owner to give proper signals to that effect so as to warn the approaching vessel to heave to. It was argued that the master of the tug was negligent in proceeding in the face of the red light displayed upon the bridge after he had signaled for the opening. The Court answered this assertion by observing that the red light "*did not signify that the draw would not open in due time in response to the opening signal*" (at p. 881). (Emphasis added.) In other words, the red light simply indicated that the bridge was closed to navigation. Were the bridge open, a green light would have been displayed. The lights simply constituted a visual indication of the position of the bridge. They did not constitute a warning signal than any more than a view of the unopened bridge is a warning signal. Moreover, the army engineer's regulations controlled and required a warning signal of two blasts, not any substitute warning signal.

2. *Munroe* v. *City of Chicago*, 194 F. 936 (7th Cir. 1912). The steamer Markham was bound up the Chicago River at about 800 feet from the Taylor Street drawbridge. The cap-

tain of the ship could see two red lights in the center of the bridge. These lights were placed in such a way as to show red when the bridge was closed and green when the bridge was completely open. When the Markham had proceeded 200 or 250 feet after her first signal, her master signaled again for the bridge to open. The bridge was not opened, "nor was any bell rung (indicating to those on the street that the bridge was opening or about to be opened), nor was any other signal given which could have led the master of the vessel to believe that the bridge was to be opened" (at p. 937). By the time the captain realized that the bridge was not going to open and backed the steamer, it was too late and the momentum of the current carried the ship into the bridge. The Court below dismissed the libel pursuant to its conclusion that the accident in the case was due entirely to the fault of the master of the steamer. The Appellate Court reversed, citing the *Clement* case. Specifically, the Appellate Court said that the conclusion of the Court below was inconsistent with the rule of the *Clement* that " 'in the absence of proper warning' the vessel has 'the right to assume that the bridge will be timely opened for passage' " (at p. 938).

Speaking to the effect of the red lights showing on the bridge, the Court observed:

> "The regulations of the lighthouse board referred to (the display of two red lights) are applicable alike to all bridges spanning navigable waters, in thoroughfares of all grades of use, to indicate whether the draw is closed or open, so that the lights are down when the bridge is normally closed, *and are in no sense indicative that the bridge will not open on signal, for the passage of the vessel.*" (Emphasis added, at p. 938.)

Here again the situation is the same as that described in *The Majestic*. The bridge gave no signal in answer to that given by the ship, and the Court explicitly noted that the red lights could not be construed as a warning signal.

3. *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 F. 271 (7th Cir. 1903). This is a libel *in personam* to recover damages sustained by the steamer F. H. Prince in consequence of her collision with the railway bridge of the appellee which spans the south branch of the Chicago River. The steamer was proceeding slowly toward the bridge when it signaled for the bridge to open. The red lights on the bridge were exhibited. The bridge was unable to open because the locks would not work. When the master of the steamer observed the bridge was not opening, he signaled for his engineer to stop. But before the headway of the steamer could be checked, the collision occurred.

In holding the bridge liable, the appellate court discussed the failure to use any signals to warn off the approaching vessel.

> "* * * when the bridge tender found that the bridge would not open * * * in view of the situation we think it was the duty of the respondent to provide, and of the bridge tenders to give, some sort of warning signal that would timely notify the vessel of the difficulty and of the danger that was imminent, of which she could not otherwise be informed." (at p. 274)

With regard to the existence of the red signal light, the Court said:

> "With respect to the bridge, the signals maintained were *appropriate signals to indicate the location of the bridge*, and possibly the manner in which the signals were designed to be operated was proper and sufficient, under ordinary circumstances, to indicate the open or closed bridge." (Emphasis added, at p. 274.)

In other words, the red light was simply an indication of the position of the bridge and in no way an appropriate signal to indicate that the bridge would or would not open.

4. *City of Cleveland* v. *McIver*, 109 F. 269 (6th Cir. 1940). The steamer Fleetwood attempted to avoid collision with the Center Street Bridge over the Cuyahoga River at Cleveland, Ohio. When it became aware that its signal for the opening of the draw was being ignored, the vessel reversed its engines. As a result, her stern swung to port and collided with the fish tug Babe moored at the city dock. The owner of the tug filed a libel against the steamer and its owners impleaded the City of Cleveland, owner of the bridge. The Court below entered judgment in favor of the libellant against the impleaded respondent. In affirming the decision below, the appellate court noted that the steamer signaled several times for the bridge to open without response. When the steamer had drifted to within 300 feet of the bridge, the bridge tender signaled by waving his hands and calling out that the draw would not open. The steamer's engines were then reversed with the result noted above. The bridge is equipped with a red ball 18 inches in diameter which may be run up and lowered from the bridge operator's cabin. A city ordinance, adopted by the War Department in a bulletin issued in 1936, required that vessels may not attempt to pass a drawbridge unless the red ball is up. The bridge is also equipped with an air whistle to warn approaching vessels if the bridge will not be open in time for safe passage. The ball was not raised nor was the whistle blown. The only signal given was the gestulations of the bridge tender as the vessel approached. With regard to the signal system the Court said, citing *City of Chicago* v. *Chicago Transp. Co.*:

> "Upon the sounding of the bridge signals by the Fleetwood, its master, proceeding at slow speed, had the right to assume that the law would be obeyed and that the draw would open *unless the customary warning signal was given. It is true the red ball was not up, but if it were, it would have conveyed no information to the master of the Fleetwood beyond that furnished by the closed draw.*" (Emphasis added, at p. 72.)

5. *City of Chicago* v. *Chicago Transp. Co.*, 222 F. 238 (7th Cir. 1915). The tug Fitzgerald towing the schooner Skeele was proceeding south with the current in the south branch of the Chicago River. As it approached the Washington Bridge it signaled for the bridge to open. No direct answer to the tug's request was given. Seeing that the bridge was not starting to open, the captain of the tug reversed her engines, the tow lines of the schooner snapped, and the schooner drifted with the current against the closed bridge and was damaged. The bridge was required by city ordinance to lower an elevated red ball or red lantern as a signal to a vessel to approach. In affirming the decree against the bridge, the appellate court indicated that the bridge was liable because of her failure to signal (in this case a physical movement of the ball or lantern). With regard, however, to the simple existence of the ball or lantern, the Court said:

> "The red ball or lantern, however, normally elevated in advance of any inquiry, gives no answer to a present question, *conveys no information beyond that furnished by the closed bridge itself by day, and by the lights required by government regulations at night.*" (Emphasis added, at p. 241.)

In each of the above cited cases, the pattern is identical. In all seven cases no properly responsive signal of warning was employed in answer to the signal from the ship requesting permission to proceed. In five of the seven cases cited, the so-called "red light" cases, the use of marker signals to indicate the position of the bridge was considered by each Court in turn as inappropriate to indicate any warning to the approaching vessel.

Despite the attempted distortions by counsel for the petitioner as to the import of the red lights, in not one of the cases cited was the ship warned off in time. In several of these cases there are further indicia of facts which, *in the*

absence of such a warning signal, could be taken to constitute an invitation to the ship to proceed. The prudence of the acts of the masters of those vessels, however, should not become a part of this discussion.

Circle Line Sightseeing Yachts v. *City of New York*, 283 F. 2d 811 (C. C. A. 2, 1960) is also introduced by counsel to show the import of signal exchanges. This case reveals a unusual signalling situation. The vessel involved could pass under the bridge only when it was closed. When the bridge was open, projections extending therefrom barred passage by the vessel. The *Circle Line* case must clearly be restricted to its peculiar facts. The simple facts in the case at bar as found by the District Court and as affirmed by the Court of Appeals, show that in response to the approach signal sounded by the Lembulus, *the bridge responded with the authorized warning signal.* Regardless of other "stimuli", the vessel did not heed this signal but continued its approach without waiting for the "come ahead" signal of three blasts required by the federal regulations. The case at bar represents a flagrant disobedience of controlling regulations. The decision of the Court of Appeals below is consistent with the general law on the subject.

B. The cases relating to the applicability of the rule of *The Pennsylvania*, 86 U. S. 125 (1873) are consistent with the opinion below.

Counsel for petitioner has represented that the bridge was defective and therefore in violation of the statutory command of 33 C.F.R. 203.200(d) that the draws "shall be opened promptly". He argues that since the bridge was defective it could not be opened promptly and that therefore "the act of operating a defective bridge is wrongful" (Pb22). The argument continues that this operation of a defective bridge constitutes a breach of statutory obligations by the bridge operator to which the rule of *The Penn*

sylvania (which assigns the burden of proof to that party in violation of a statutory duty) should be applied.

One basic error is that the defect in the bridge is not chargeable to respondent, Peschken. He is not the owner of the bridge. Nor was he responsible for its repair.

To bolster the argument, petitioner's counsel cites several cases relating to the applicability of the *Pennsylvania* rule in situations involving a violation of statutory duty. One of these cases, *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537 (C. A. 2, 1959), discloses a failure on the part of the bridge to set sufficient lights in breach of a statutory requirement therefor. The second case cited by counsel, *Fort Fetterman* v. *South Carolina State Highway Department*, 261 F. 2d 563 (C. A. 4, 1958) deals with a collision involving a bridge constructed in a manner materially at variance with plans and specifications issued by the War Department. In both of these cases the rule of *The Pennsylvania* was invoked (despite other facets of negligent conduct which appeared) to shift the burden of proof to the bridge for violation of statutory duty.

Counsel's accusations of statutory violation which may require the application of the rule of *The Pennsylvania* are ill-founded. On page 22 of his brief, counsel declares that:

> "The opening sentence of 33 C.F.R. 203.200(d) commands that the draws 'shall be opened promptly' and a similar command appears in paragraph (e) where it is required that the draws shall be opened 'at once'."

Ignoring the fact that counsel's reading has not been accurate and that section (d) of the cited regulation does not say what he claims (his undoubted reference was to section (a)), the language of section (d) may not be divorced from the rest of the regulation. This section provides for a specific signal to be given "in case of delay in opening the draw * * * or as may be necessary by accident to the ma-

chinery or other contingency". Since the regulation has wisely provided for a warning system in the event for some reason the draw cannot be opened promptly, and since the bridge tender, upon perceiving that such prompt opening might not be accomplished, sounded the prescribed signal, it is very difficult to understand how this explicit compliance with the appropriate regulation can be considered at the same time a violation of its terms. It is possible that by his citation of the *Fort Fetterman* case counsel has attempted to imply that the bridge in the case at bar was defective because it did not conform to federally authorized plans and specifications for its construction. This, of course, has never been in issue in this case. No proofs were offered or taken on this point.

If the rule of *The Pennsylvania* is, however, to be invoked, regard must be had to the language of the Court of Appeals in reversing the District Court. Referring to the failure on the part of the vessel to obey the signal from the bridge, the Court said:

> "If her (the vessel's) failure to obey the signal contributed to the collision, she cannot recover under the rule of *The Pennsylvania*, 86 U. S. 125 (1873). But we do not need the authority of *The Pennsylvania* to decide this case against the libellant. The disobedience of the rule was the substantial cause of the collision." (Pb50)

Petitioner's invocation of *The Pennsylvania* rule does not advance petitioner's cause; this very rule bars petitioner from recovery, as found by the Court of Appeals.

POINT III

The opinion of the Circuit Court creates no new rule of law that requires review by this Court; the contentions of petitioner, however, would create uncertainty and an unjust result in the case at bar.

In its opinion, the Court of Appeals gave recognition to the necessity for the rigorous enforcement of regulations pertaining to navigation. In so doing, the Court manifested its appreciation of the dangers presented in those situations which the regulations are intended to control. This recognition was a motivating force behind the rejection of the novel invitation theory espoused by the trial court. It may be argued that in a case in which no warning signal is received by a vessel, it is necessary to allow a reasonable assumption of an invitation to proceed, solely in order to fix the respective duties and responsibilities of the parties in case of mishap. This necessity, however, does not remove the confusion which must exist in the minds of the parties immediately before the collision occurs. It is imperative, therefore, that the opinion of the Court of Appeals be left undisturbed and that the invitation theory not be extended in such a manner that will add to the confusion and the concomitant dangers to navigation. To extend the invitation theory *in the face of a warning signal* would be to force upon the bridge tender as to confusion what his next move should be. This problem was recognized by the Secretary of the Army in the promulgation of 33 C.F.R. 203.200 (d), when he wisely provided for a "come ahead" signal when the bridge was ready to receive the vessel. This form of invitation is clear. An unprescribed invitation created by other action would be confusing.

It is important for an additional reason to accept the findings of the Court of Appeals. Even if it should be deemed necessary to consider the application of the invita-

tion theory to a situation in which a vessel proceeded in the face of an explicit warning, such a possible application should not be explored in the context of the fact situation here presented. For this case deals not merely with simple negligent disobedience on the part of the approaching ship; it deals with negligent disobedience *arising from a statutory violation.* In fact, the Court of Appeals has indicated that although it was sufficient to decide this case on the disobedience of the rule of navigation, "if the ship's failure to obey the signal contributed to the collision, she cannot recover under the rule of *The Pennsylvania*, 86 U. S. 125 (1873)" (Pb50). Thus the need to sustain the decision below applies to the specific facts of the case at bar and applies, as well, as a guide to future conduct and as a reaffirmation of existing principles of navigation law.

POINT IV

The result reached below can be sustained on the point of fact that the vessel's excessive speed caused the collision, and on other grounds; therefore, the points raised by petitioner as a basis for *certiorari* would not alter the result on an appeal to this Court.

The determination of the Court of Appeals can be sustained on any of the following grounds:

1. The vessel was travelling at an excessive speed.

2. The draw span did not stop during its ascent.

3. Petitioner's master, Capt. Hawkins was discredited as a witness; the vessel's records were in conflict and contradiction; an inked notation made by Captain Hawkins in the Bridge Movement Book (not kept by the Captain, and otherwise entirely recorded in pencil simultaneously with events observed on the bridge) conflicted with page 9 of the Deck Log; page 67 of the Deck Log which contained

a full report of the accident is the only page in the log which is out of order: it *follows* "page 68," and "page 68" *precedes* page "67"; the story on page "67" conflicts with the captain's testimony at the trial where he said several times that the vessel was at the Pulaski Skyway when it signaled for the bridge to open; page 9 of the Deck Log shows that the vessel cleared the Lackawanna Bridge at 1546, but in his inked notation in the Bridge Movement Book the Captain seeks to designate the bridge cleared at 1546 as the City Bridge.

As for the speed of the vessel, Captain Hawkins fixed its position at the Pulaski Skyway at 1553½. The collision occurred 3½ minutes later. The distance covered in this time was less than .6 nautical miles. The speed of the vessel by Captain Hawkins' own admission was 9 to 10 knots (R24a). This is almost the maximum speed of the vessel in the open ocean (R24a). Also admitted was the fact that 3.42 knots was a sufficient speed at the time to maintain steerageway of the vessel (R22a).

When the speed of a vessel impairs its ability to meet unexpected dangers, particularly those arising in crowded or confined waters, the vessel is held responsible for the accident. In most such cases, speeds of six knots or more are considered excessive. See: *The Favorita*, 85 U. S. 598, 603 (1873); *The Acilia*, 120 F. 455, 458 (4th Cir. 1903); *The Corsica*, 76 U. S. 630, 634 (1869); *The George H. Jones*, 27 F. 2d 665, 667 (2nd Cir. 1928).

In the last case cited, the late Judge Learned Hand said:

> "Speed is clearly relative to the situation of the ship; what is proper at sea is ordinarily improper in a harbor, and one harbor speed should differ from another. The Jones was moving into crowded waters; besides the Sunoco and the tow, there were several small tugs thereabouts, and she was to pass within 400 or 500 feet

> of a ferry slip from which at any time a ferry might emerge, and into which another was bound. *At such a place and at such a time she was bound to hold herself in reserve against possible miscarriages on the part of any of these vessels.*
>
> Not much can be deduced from the fact that she had so much difficulty in checking her way after passing the Sunoco. She had put on what steam she had when she hard astarboarded to escape that vessel, and in that we cannot charge her with fault. We believe, however, that the rate at which she was approaching upset the Sunoco's composure and made her miscalculate the Jones' course and her purpose. For that she was at fault, quite as though it had been the direct cause of the collision. Amid such a tangle of shipping and in such a narrow berth, she should have foreseen that the only safe course was to move at a very moderate speed." (Emphasis added.)

The proof that the bridge span did not stop rising is, in outline, the following:

(a) Only Captain Hawkins said the bridge stopped.

(b) P-4, the Bridge Movement Book does not say the bridge stopped; this book records events as they occur; it simply says at 1556, "Full astern, bridge not opening fast enough." This says that the bridge was still opening, though not fast enough for the speed of the vessel.

(c) Page 9 of the Deck Log does not state that the bridge stopped.

(d) Captain Hagen, a pilot aboard the Lembulus said: "it's a slow bridge, but as far as I can recall, she went up but slowly" but he denied that he ever saw the bridge stop (R35a).

(e) The Accident Report of the bridge tender made out on December 20, 1957, states that "2 long blasts" were given by the bridge "due to electrical trouble" but that the vessel did not slow up until after the collision and that the "span continued to go up slowly" all the while.

(f) In the "few moments" (Pb85) after the impact with the foremast, the bridge moved a full 9 feet before the mainmast struck. This is calculated from the captain's testimony, the draft of the vessel and the height of the collision points of the masts. See: Pb85. This calculation has not been denied by petitioner.

(g) Although "the second officer, the chief officer, the pilot, the man at the wheel" and Captain Hawkins were in the wheelhouse on December 20, 1957, from 1543½ to 1557, Captain Hawkins could not recall "who else saw it (the bridge stop) at the time" (R12a).

(h) Statements were taken from the crew by the owner's legal representatives but no other crew members were produced as witnesses.

(i) Hines, Bents, Peschken and Hagen all testified that the bridge did not stop.

(j) Waxin, petitioner's only witness besides Captain Hawkins, said he did not know "whether the bridge stopped at all" (R29a).

Thus, a full understanding of the particular facts of this case compels the denial of recovery to the vessel. Although the District Court judge reached a contrary conclusion we submit that such conclusion was completely unjustified on the facts and the law. The trial judge invented a concept of invitation to proceed in the face of a warning signal not found in any other case, and unanimously rejected by the Court of Appeals. The trial court's opinion, moreover,

contains numerous errors of factual statement and factual conclusions. For example, at Pb29 the District Court's opinion recites the entry on page 9 of the Deck Log, including the vessel's passage of *the Lackawanna Bridge at 1546*. The trial court adds that, "These entries are confirmed by similar entries in the bridge movement book and in the engine movement book of the vessel." Later, in its opinion, the lower court said (Pb42), " It is *uncontradicted* that the vessel passed the *city bridge* at 1546 hours * * *." (Emphasis added.) The choice of the bridge passed at 1546 affected the court's findings of the vessel's speed between 1546 and 1557. If the vessel passed the Lackawanna Bridge at 1546, it traveled a longer distance to the Lincoln Highway Bridge between 1546 and 1557.

The trial court also noted the conflict in testimony respecting the turning of the vessel. Only Captain Hawkins testified that the vessel went stern-first through the Lackawanna Bridge and was turned between the Lackawanna Bridge and the City Bridge. Petitioner's other witness, tugboat Captain Waxin, could not recall what happened. All other witnesses, including operators of the Lackawanna Bridge, said the vessel went through that bridge *bow-first*, after first being turned in the river. But in its first opinion the trial court failed to resolve this conflict. The trial court failed to make any findings on the incredibility of Captain Hawkins' testimony as it bore on the speed of the vessel and on petitioner's overall case. But on the motion to set aside the judgment notwithstanding the trial court's findings, the trial court was finally persuaded and said:

> "I am satisfied she turned above, north of the Lackawanna bridge." (R82a)

This is the final refutation of the testimony of Captain Hawkins and of petitioner's case. The whole time schedule of the vessel's passage downstream was built around the falsehood that the vessel went *bow-first* through the Lacka-

wanna Bridge and was then turned in the river *south* of that bridge.

The trial court also referred vaguely to the rules of the New Jersey Highway Department as though they had a bearing on the case (Pb28). But the court in its letter opinion after the motion, after the contention was made that only the federal regulations governed, said the vessel was "entitled to rely" on the regulations of the Secretary of the Army" (Pb45), since there was "no evidence that the master of the vessel or her pilot had knowledge * * * of the regulations adopted by the Highway Department with regard to the giving of warning signals * * *." As for the trial court's reliance on the theory that Peschken should have used alternate controls, this was never argued by petitioner, it was abandoned by the trial court as a ground for supporting the judgment (in its letter opinion following the motion), there are no facts to support the conclusion that the alternate controls would have moved the bridge faster after the alleged stoppage and it was never an issue litigated by the parties. There is simply no engineering data or expert evidence to indicate that Peschken was negligent for not using alternate controls, when the evidence clearly shows that the span moved 9 feet in the "few moments later" (Pb85) after the foremast struck the bridge.

Much more can be said. But as the Court of Appeals remarked the question to be decided is much simpler than the briefs would indicate (Pb48). The Court of Appeals properly decided that question. But it could have denied recovery to the vessel without ever reaching the question of the exchange of signals and the right to proceed. For the evidence overwhelmingly shows that the vessel was going too fast even if it had the right to proceed and that its early arrival at the bridge before the bridge could fully open caused the accident.

Moreover, the complete unreliability of petitioner's case justifies a denial of recovery. Alterations in log books, the contradiction between log books and witnesses and among log book entries, tampering with the records and the failure to produce testimony of crew members on a material issue are facts that cast "suspicion" on petitioner's case and are strongly "condemned in courts of admiralty." See: *The Silver Palm*, 94 F. 2d 754, 762 (9th Cir. 1937); *The New York*, 175 U. S. 187 (1899).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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New Jersey,
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THEODORE I. BOTTER,
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and
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[APPENDICES FOLLOW]

Appendix A

Excerpts from Testimony

Newark, New Jersey
May 2, 1960

Before:

HONORABLE REYNIER J. WORTENDYKE, JR., U. S. D. J.

Appearances:

MESSRS. MCCARTER & ENGLISH,
By: FRANCIS E. P. MCCARTER, ESQ. and
ROBERT M. JULIAS, ESQ.,
Proctors for Libellant.

DAVID D. FURMAN, ESQ.,
Attorney General of New Jersey
By: ALFRED P. D'AURIA, ESQ.,
Proctors for Respondents.

* * *

WILLIAM AIRD HAWKINS, called by the libellant, having been first duly sworn, testified as follows:

Direct examination by Mr. McCarter:

* * *

Q. On December 20th, 1957, at about three o'clock in (4) the afternoon, would you state where the Lembulus was? A. The Lembulus was laying at Copper Coke, Hackensack River.

Q. What was its position? A. She was moored portside to the wharf, heading north.

Appendix A

Q. Now, Captain, before we go any further with the Lembulus, from that point on, I show you an U. S. Coast and Geodetic Chart of the Passaic and Hacksensack River, which has heretofore been marked as plaintiff's exhibit for identification as Plaintiff's Exhibit 1 and ask you whether or not you can identify this chart as depicting the area in which your vessel was moored on that date. A. Yes.

Mr. McCarter: I ask that this chart be marked in evidence.

The Court: Any objection, Mr. D'Auria?

Mr. D'Auria: Yes. I did object.

The Court: On what grounds?

Mr. D'Auria: Sir?

The Court: On what grounds?

Mr. D'Auria: I don't know if that is an official map of the area.

The Court: It is United States Coast and Geodetic Survey.

Mr. D'Auria: I still don't know, your Honor.

The Court: I'll take judicial notice of it.

* * *

Q. When on the high seas, whose duty is it to make entries in the Log Book? A. The entries are then made by the Officer on watch.

Q. Is there any regulation which requires that these entries be made during the time the vessel is in port, as you testified?

* * *

A. Yes. These are done in the normal course of running the vessel.

Q. And how often are the entries made in the normal course of the business of the vessel? A. At the end of each day.

* * *

Appendix A

Q. All right, Captain, will you testify what is the purpose of your signature which we find is on that page and on numerous other pages of the book? A. My signature indicates that I have read and agreed with the entries which have been made.

* * *

Q. Captain, we now have you at Copper's Wharf about three p.m. on the date in question, December 20th, 1957. Will you state, Captain, since you have already told us you were outward bound, what your destination was? A. From that point, the vessel was bound for Curacao.

Q. In the West Indies? A. In the Dutch West Indies.

Q. What time of day did you, in fact, start your movement into the channel from position A on Exhibit P-2? A. The vessel started moving at 1529 hours on the 20th of December, 1957.

Q. Did you have a pilot on board at that time? A. Yes.

Q. Who was he? A. Captain Bassett.

Q. Of what company? A. The Moran Towing Company.

Q. Where is he now? (22) A. I don't know.

The Court: What was his name?

The Witness: Captain Bassett.

The Court: Of Moran?

The Witness: Yes.

Mr. McCarter: I think we can stipulate, Mr. D'Auria, that Captain Bassett is dead.

Mr. D'Auria: Yes.

Mr. McCarter: To take care of his location, unfortunately.

Q. Were there any tugs accompanying you from that point on? A. Yes.

Q. How many? A. Two.

Q. And from what company? A. Moran Towing Company.

Appendix A

Q. Will you describe the first movements of the vessel? Until it got into channel, pointing seaward. A. With the assistance of tugboats, the vessel stern was pulled off the wharf. She was then straightened out to pass stern first through the Lawekawanna Bridge, and on getting into a favorable position seaward of this bridge, she was turned with the assistance of tugs and headed seaward.

Q. Will you please put on this chart, in the same manner (23) you did before, the approximate location of the Lembulus when it was first turned seaward.

(Witness marks.)

Will you label that with the letter B, and it might assist the Court if you were to put next to that the approximate time when this position was reached. A. 1540 hours on the 20th of December, 1957.

* * *

The Court: So you want to account for the speed all the way down.

Mr. McCarter: I do, sir.

Q. Now, Captain, can you testify what the bridge movement orders were between points B and C? A. At 1540, the vessel was turned seaward and lying dead in the water, more or less. At 1542, the vessel was put to slow ahead, and after passing under City Bridge at 1546, dead slow ahead. After passing under City Bridge at 1546, the engine was put on dead slow ahead. At 1546, at half slow ahead. She was, by that time, about the bridge.

Q. What then was the approximate time that the vessel was at position C, bearing in mind that this is not to scale? A. 1546-½.

Q. Will you please insert that on the chart.

Appendix A

(Witness writes.)

Now, Captain, what was the next bridge movement order to the engine room after that point?

A. At 1547, half ahead. At 1547-1/2, full ahead.

Q. By full ahead, will you state what is meant by that. A. Full ahead harbor speed.

Q. What would the approximate speed of the vessel be under the conditions which then existed at harbor full ahead? A. The maximum speed of nine knots.

• • •

Q. Captain, what would you say would be the speed of half ahead under the conditions that existed at that time, and by the way, I am going to ask you what those conditions (27) were in just a moment. A. About seven knots.

• • •

Q. How long did you continue at harbor full ahead, Captain? A. Until 1553-1/2, when the engine was moved to slow ahead at dead slow ahead in the one movement.

Q. Now the next bridge I notice is called the Pulaski Skyway. That is not a drawbridge, is it? A. No.

Q. That you can go under without any movement of the bridge. I think that is conceded.

Q. Now, the bridge after that is the Lincoln Highway bridge. That, however, is a drawbridge, is it not? A. Yes.

Q. Did you make any signals to that bridge, warning them of your approach? A. Yes.

(28) Q. At about what time did you make that signal, do you recall? A. At about 1553, approximately.

Q. Where were you in relation to the Pulaski Skyway when that signal was made? Were you north of it or south of it, or where? A. Just about to pass under it, slightly.

Appendix A

Q. What signal did you make to the bridge? A. Three blasts.

Q. Can you state what the bridge did thereafter? A. The bridge answered our signal and commenced lifting almost immediately.

* * *

Q. Captain, during the time, all this time that you have testified to, during the time that the vessel was passing down the river, where were you located on the vessel? A. On the bridge.

Q. And you testified that a pilot was aboard. Will you tell us whether or not that pilot was in charge of the vessel at that time, or whether you were in charge of it? A. I was in command.

Q. If the pilot had given an order with which you disagreed, did you have authority to countermand that order? A. Yes.

Q. At the time the orders were given to the helmsman, who, in fact, gave those orders during this period? A. The pilot.

Q. And were you present when he gave all those orders? (30) A. Yes.

* * *

Q. How far to the north of the draw was the bow of the vessel when she blew for the draw, when she signalled for the draw? A. Just north of the Pulaski Skyway.

The Court: All right. Go ahead.

(34) Q. Well, now for schematic purposes only, Captain, will you put on the chart the very approximate location of the vessel at the time the speed was reduced from harbor full ahead that you have already testified? A. 1553-½ slow

ahead and dead slow. The vessel would be approximately at this position here, just north of the Pulaski Skyway.

Q. Label that, if you will, please.

I take it that is the time you have already testified to, approximately the time that the signal was made to the bridge? A. Yes.

Q. Well, now, would you give the speed orders made to the engine room between the time the speed was reduced from harbor full ahead to the time that she finally arrived at the Lincoln Highway bridge. A. At 1554, the engine was stopped. At 1555, dead slow ahead and stop; 1556, full astern, and at 1557, the top mast, the forward top mast hit the Lincoln Highway bridge.

Q. Now, you have taken these times by reference to the bridge movement book, have you not, sir? A. Yes.

Q. Have you compared the entries in the bridge movement book with comparable entries of the engine movement book for that day? (35) A. Yes.

Q. Have you found any discrepancies in time? A. Yes.

* * *

Q. Approximately how far north of the Lincoln Highway bridge were you when you observed that you could not clear it? A. A. About a ship's length away.

Q. By that, do I understand that the bow of your vessel was approximately a ship's length away from the near edge of the lift? A. Yes.

* * *

Q. Will you state to the Court what in your experience is the ability of a person standing on the bridge of a vessel to judge whether or not you were going to clear a bridge as you approach it? A. It is almost impossible until you are in a position where you can't do very much about it.

Appendix A

It is almost impossible to tell whether you will clear a bridge when you are passing under it until you are in an impossible position to do anything about it.

* * *

Q. And how long approximately would it take under the conditions that existed to bring the vessel to a halt by the use of full speed astern? A. About five minutes.

Q. Will you testify whether or not the use of full speed astern—I withdraw that question—will you testify now as to just how long under the conditions then existing you could safely have used full speed astern? A. Not more than a minute.

Q. What would have happened under the conditions then existing had you used it for longer than that? A. The vessel would have canted to starboard. The bow would have hit the pier on one side, and, as she continued to make headway through the pier, the stern would have gone over to the port and the rudder and propeller would be in (44) danger of striking the pier on the other side.

Q. Captain, you already testified that you were under ballast at this time. Can you tell the Court how high above the water line the top, which I believe you call the truck of the foremast, was as you went down the Hackensack River on that day?

The Court: It was the foretop, wasn't it?

The Witness: The foretop.

The Witness: Approximately one hundred and twelve feet, six inches.

Q. And how high was the truck of the fore main mast—the truck of the main mast? A. The truck of the main mast was approximately 112 feet.

Q. And how high above—well, I'll withdraw that—

which of those two masts is the higher mast above the deck? A. The main mast.

Q. How do you account for the fact that the foremast was six inches higher at that time above the water line than the main mast? A. On account of the trim of the ship at that time when she was in ballast.

Q. In other words, the stern was lower in the water than the bow? A. Yes.

* * *

Q. What point on the foretop mast struck the bridge, Captain? A. The foretop mast struck the bridge approximately nine feet below the truck.

Q. And what point, if any, on the mainmast, struck the bridge? (46) A. The main top mast struck the bridge approximately four inches, four to six inches below the truck.

* * *

Q. Now, you have testified, Captain, that you struck—the foretop mast, at least, struck the bridge at, I believe it was, 1557 or thereabouts; and that the bridge was at a stationary position at that time. Did it, in fact, ever again start to rise? A. Almost immediately after the foretop mast had hit the bridge, we noticed that the bridge started rising again.

Q. Did it continue to rise for any time? A. It continued to rise until the ship had passed underneath it.

* * *

Cross examination by Mr. D'Auria:

* * *

Q. On this deck log book, this story was written by the Chief Officer, is that it, sir? A. Yes.

(68) Q. Not the Chief Engineer, but the Chief Officer? A. The Chief Officer, yes.

Q. That is page 67, the list of casualties, right? A. Yes.

Q. I am confused then. That story was written after you had a conference with the Chief Officer, is that right, sir? A. Yes.

Q. Now the other entries made by the Chief Officer in this book, does it state that the bridge stopped in any other part of this book with the exception of page 67? A. No.

Q. It does not, only on page 67, is that correct, sir? A. Yes.

Q. And am I correct in stating that you had a conference with your Chief Officer before the entry was made? A. Yes.

Q. And based on the conference that you had with the Chief Officer, he received the information that the bridge stopped from you, isn't that correct? A. Yes, and also—no—I withdraw that.

Q. Now this story which is written is made up after the conference with you and the examination of the engine movement book, the bridge movement book, and what was the other book, the engine—

(69) The Court: The engine movement book.

Q. The engine movement book. Now, nowhere in the engine log book, the bridge movement book, or in any other part of the deck log book, is it ever mentioned that the bridge stopped? A. No.

Q. Now, after the story is made up and put in on page 67, there is a copy of it prepared, isn't that right? A. No, the copy is made by carbon paper at the same time that the entry is made.

Q. Yes, sir, and then that carbon copy is sent to the home office? A. It is sent to the office, yes.

* * *

Appendix A

Q. This November and December trip was your first trip (85) of the vessel known as the Lembulus, is that right, Captain? A. Yes.

Q. And December 20th was the first time you ever entered the Hackensack River to go to Copper's by vessel, is that right? A. No. The ship came into the river and the ship left the Hackensack River.

Q. I meant before December 20th, you went up the Hackensack River, is that right, sir? A. Yes.

Q. That was your first time? A. Yes.

The Court: But that voyage was your first visit to the Hackensack River?

The Witness: Yes.

The Court: With that vessel?

The Witness: Yes.

* * *

Q. Would you tell me who was in the wheelhouse on December 20th, at 1543½? A. There was the man at the wheel, the pilot, the second officer, and myself.

* * *

Q. On December 20th, 1957, for 1543½ to 1557. A. The second officer, the chief officer, the pilot, the man at the wheel, and myself.

* * *

Q. Now, when you struck the bridge, where were you and the pilot? A. We were outside on one side of the bridge.

Q. And before you struck the bridge, you instructed someone to leave that wheelhouse and go and warn the crew? A. Yes.

Q. What was that? A. The Chief Officer.

Q. He left the wheelhouse to warn the members that were on deck that you were going to strike? A. Yes.

(92) Q. To get out of the way? A. Yes.

Q. Did you actually see him do it? A. Yes.

Q. Do you know, of your own knowledge, as to, besides yourself, who actually saw the bridge stop? A. I can't recall who else saw it at that time.

Q. You cannot recall. Are there statements made orally or in writing by any other members of the crew with the exception of yourself and the pilot?

The Court: What statements?

Mr. D'Auria: Statements to the occurrence of the bridge stopping.

Mr. McCarter: Where?

The Court: Do you mean by statements, any statements by anyone else? If he knows of it, let him mention it.

A. At Bethlehem Steel, while the ship was in the Bethlehem Steel yard, the owners' legal representatives came down and took statements from various members of the crew.

Q. Where are those statements today? A. I don't know.

Q. You don't know? A. No. I presume that the owner has most of them.

* * *

Q. You stated that, when you got away from the wharf, and before the tugs moved your ship from the stern to the bow, you had backed through the Lackawanna Bridge, is that right? A. Yes.

Q. How long did you say that these movements took?

The Court: There is a question pending, Mr. Witness. Can you answer it?

A. From the time, from about 1529, and the turning, the movement was completed at 1540.

Q. At 1540, where was the position of your ship? A. Approximately here (indicating) at position B.

* * *

Q. You are certain, sir, that you did not go through the Lackawanna Bridge with the bow—

The Court: Bow first, you mean?

Mr. D'Auria: Bow first.

A. Yes.

Q. You are positive of that? A. Yes.

Q. Now, reading from the extract of the ship's log book, "3:29 PM, left Kearny Point, New York, in ballast, and proceeding down river bound for Curacao, pilot on board and tugs Catherine Moran and Pauline Moran in attendance. 3:46 PM, dead slow ahead, vessel cleared Lackawanna." Which is correct? You have a distance from the bridge where your vessel turned around at 1540. This is an extract from the ship's log book. Do you want the ship's log book to look at? A. Yes, please.

The Court: Apparently, he has the log book. What is your next question?

Mr. D'Auria: I have asked him which is correct. He has 1540 beyond the Lackawanna Bridge, making a turn, when the log book states, "3:46 PM, dead slow ahead, vessel cleared Lackawanna Bridge"; dead slow ahead. What (96) does that mean to you?

The Witness: Dead slow ahead.

Q. What does ahead mean; that you are using the stern or the bow? A. You are going ahead.

Q. Ahead, meaning which way? Which part of the ship

was going ahead? Doesn't that mean that the bow—that you had already been turned before you cleared the Lackawanna Bridge at 3:46, such as it states in that book? A. No. The ship was taken off the wharf, stern-first, and turned below the Lackawanna Bridge.

Q. You still say then that this does not mean that you went through the Lackawanna Bridge with the bow dead slow ahead? A. Yes. The ship was turned off this pier with the stern, and you are almost up against this bridge in that position, very close to it. The ship was towed through here.

Q. Stern first? A. Stern first, turned and headed down-river.

Q. But your books do not say that. It says, "Dead slow ahead at 3:46 PM, vessel cleared Lackawanna Bridge." That is what it says. A. Yes, this book here.

Q. Does anything in your bridge movement book and (97) your engine movement book tell you which part of the ship went through the Lackawanna Bridge? A. No, but I know that, at 3:46, the vessel was in fact under the City Bridge.

Q. That "City Bridge" was written when? A. When was it?

Q. When was it written? A. That was written in by me when I asked the pilot what the name of that particular bridge was.

Q. When was that, on December 20th? A. Yes.

Q. At what time, what time of day? A. I don't recall the time, but it was written that day, when I checked with the pilot what the name of that bridge was.

Judge, you see, our charts are very small.

Q. In the bridge movement book, sir, at 1540, your Second Officer put there what? A. Vessel turned in channel at 1540.

Q. Does he state where he turned in the channel? A. Pardon?

Q. Did he state there where he turned in the channel? A. No.

Q. Then is that statement in the bridge movement book (98) and the statement in this book which is written after and at the end of the day, and a copy of these books here, as was testified to before, the correct statement, or these books, that at 3:46 dead slow ahead, vessel cleared Lackawanna Bridge? A. Yes. Well, I think I can explain this Lackawanna Bridge. The first bridge, which is noted in the movement book as the vessel passing, is here at 42½, slow ahead, approaching bridge. Now, this bridge here, which I noted as City Bridge, was this set of bridges here. The Chief Officer makes up this book at the end of the day. He noted from this record—I'm assuming that this is how this mistake was made—that he noted from this record that the ship passed the bridge; from our very small scale chart covering this area, he took the first bridge over the river as this bridge here.

The Court: Indicating the Lackawanna.

The Witness: Indicating the Lackawanna Bridge by mistake, whereas it was, in effect, this bridge here.

The Court: Indicating what you referred to as the City Bridge.

The Witness: Yes.

The Court: All right.

Q. Why was not that book made at the end of the day (99) corrected to state that it was the City Bridge there and this book or ship log book, the engine book, and this report that was made? You testified on direct you read those reports and you signed them, and that they were all accurate. A. Well, I didn't check the actual name of this bridge. I didn't check it from the chart myself. I assumed that my Chief Officer had picked it up correctly.

Q. Now, sir, which one of these were put in the books first? City Bridge or was it put in the bridge movement book or was it put in that book?

The Court: By "that book," you mean the deck log?

The Witness: The movement book is filled up at the instant that these engine movements are made.

Q. This deck log? A. Is copied from.

Q. From the bridge movement log? A. This deck log is made up at the end of the day from the information gleaned from this. This is not necessarily a complete copy of this.

The Court: So we get all these "this's" straightened around, and an appeals court can know what we are talking about, what you have referred to here as the deck log is made up at the end of the day from information obtained from the bridge movement book, which is entered therein (100) immediately upon the happenings in question, is that right?

The Witness: Yes, that is true.

Q. Now, sir, when this deck log book was made up—and who was it—the Chief? A. The Chief Officer.

Q. And the Chief Officer looked at this book, why did he put "City Bridge," instead of Lackawanna in that book?

Mr. McCarter: If he knows.

Mr. D'Auria: Stop interfering. Sit down.

A. I don't know.

Q. You don't know. Did you write City Bridge in this bridge movement book before this was made up? A. Yes, because I recall getting this information from the pilot.

Q. Why didn't he then—the man who made this book up—enter in there as "City Bridge"? Instead of Lackawanna? I'll ask you again.

Mr. McCarter: I don't think the Captain is competent to testify the reason for somebody else doing something.

The Court: I agree with you. I will sustain the objection. I often wonder why some other people do some things. You examined this report, sir, and you signed it as being an accurate report, is that right?

(101) The Witness: I signed it, believing it to be correct.

Q. Now you find it is not correct, is that right, sir? A. Yes.

* * *

Q. And when you read those, you made no corrections, is that right? A. That is correct.

Q. Now, sir, you put yourself at 1540 beyond the Whitpen Bridge or the Lackawanna Bridge, in between the Lackawana and or the next three bridges that we referred to as the Pennsylvania bridges, is that right? A. Yes.

Q. In the bridge movement book, at 3:41, you are stopped, according to this.

Mr. McCarter: Of course, I object to that statement because it is entirely incorrect. It doesn't say the vessel is stopped. This is a list of commands to the engine room.

The Witness: Stopped, yes, that is correct.

The Court: He says it is correct.

Q. What does it mean, sir? A. It means that the engine has stopped.

Q. But the vessel is still moving? A. The vessel is probably still moving, yes.

* * *

Q. At 1543½, slow ahead, bridge open, is that right? A. yes.

Appendix A

Q. At 46, 3:15, 46, you passed under the bridge. A. Yes.

Q. What bridge did you pass under? A. This bridge, these bridges.

The Court: City or Whitpen Bridge.

The Witness: These three bridges, sir.

Q. And at 46½, slow ahead? A. Yes.

Q. Is that right? A. Yes.

Q. So it took about three minutes to go through those three bridges? A. Yes.

Q. At 1547, you gave the—or the pilot gave the engine room word to go half ahead? A. Yes.

• • •

Q. At 47½, if I recall this morning, you said the speed —that that is about seven knots. A. Yes.

Q. Half ahead, if I recall this morning, you said that was approximately seven knots. A. Yes.

Q. And at 47½ full ahead is approximately at harbor speed, which was nine knots. A. Nine knots, yes.

Q. So from the time you left the last bridge you gave the orders full ahead at nine knots? A. Yes.

Q. Do you know the distance between the last railroad (106) bridge to the Skyway?

The Court: The Pulaski Skyway.

Q. If you don't, I'm going to ask you to be guided by the official geodetic map with a pair of dividers to give you the distance.

Mr. McCarter: Here is the one. It is in evidence.

(Witness works with map and dividers.)

A. .57 miles.

Q. .57 miles?

• • •

Appendix A

Q. Now, sir, what is your speed in the ocean, the cruising speed of this vessel? A. Ten and three-quarters, eleven knots.

Q. Sir, what is the slowest speed at which a vessel the size of the Lembuhus can be controlled and navigated through a channel having several bridges? A. The speed will depend upon the conditions of tide and weather prevailing at the time. I would estimate about four knots, five knots.

• • •

Q. Now, the vessel was moved stern first through the Lackawanna Bridge, is that right? A. Yes.

Q. It was turned between the Lackawanna Bridge and the Whitpen Bridge or City Bridge, is that right? A. Yes.

Q. Did it then proceed under its own power continuously through the Whitpen Bridge, which you call the City Bridge, the freight and passenger bridge of the Pennsylvania Railroad, under the Pulaski Skyway to the Lincoln Highway, Hackensack bridge? A. Yes.

Q. Under its own power continuously? A. Continuously under its own power.

Q. At what time did the mast strike the Lincoln Highway bridge or the Hackensack bridge? A. 1557 hours.

Q. Now, you have marked on the Coast Guard chart of the area, and on the photographic enlargement, the position (112) of the vessel at various times during its course down the river. A. Yes.

• • •

Q. You say yes. Now, you also marked on the Coast Guard chart, on the enlargement, the position of the vessel at $1553\frac{1}{2}$ hours.

Appendix A

Will you again identify this position? A. At 1553½ hours, the vessel was approximately north—approximately a ship's length, or thereabouts, north of Pulaski Skyway.

Q. About 440 feet away from the Pulaski Skyway? A. Around that.

Q. Will you identify that from the Skyway? Put it at a ship's length from the Skyway—where is the Skyway? A. This bridge here.

Q. With your red pencil, and put the time down, and (117) the length of the ship away, 440 feet or 450 feet away. A. That was at 1553 hours?

Q. 1553 hours. A. Is that the time?

Q. Is that the time that is marked on your large map? A. 1553½.

Q. Put that down. A. 1553½.

Q. Now, can we safely say that is about 200 yards or a tenth of a mile? A. Approximately, yes.

Q. Do you want to put that down. Now, take into account that the scale of the miles set forth on the Coast Guard chart—can you measure distance on this chart with reasonable accuracy? A. Yes.

Q. You can. Now, will you measure and calculate the distance from the vessel's position at 1540 hours to its position at 1553½ hours? A. .75 of a mile.

Q. .75? A. Of a mile.

Q. That is about three-quarters of a mile, more or less? A. Yes.

(118) Q. What is the elapsed time between 1540 hours and 1553½ hours? A. 13½ minutes.

Q. And the vessel traveled from the first position to the second position in 13½ minutes? A. Yes.

Q. In moving from the first position to the second, it traveled about, as you say, .75, or about three-quarters of a mile, is that right? A. Yes.

Q. In traveling this distance, about .75, as you said, miles, in 13½ minutes, what was the average speed of the vessel in knots? A. 5.7 knots.

Q. May I see your mathematics, please?

Mr. McCarter: I couldn't hear that.

A. 5.—

Q. May I see your mathematics, please? A. That—

The Court: Who speaks first?

Q. Do you find an error? A. It is. I wish to correct it.

Q. Subtract 3.42 knots; 3.42 knots. A. Yes.

(119) Q. That was the speed that you were doing for .75 miles in 13½ minutes, right? A. Yes.

Q. Will you measure and calculate the distance from the position at 1553½ hours to the Lincoln Highway, Hackensack River Bridge.

The Court: From the map?

Mr. D'Auria: Yes, sir.

Q. Do it accurately with the scale. A. .53 knots—the distance is .53 miles.

Q. .— A. 53 miles.

Q. And you did that by the position that we said we were a length away, a ship's length away from the Skyway? A. Yes, from here (indicating).

Q. And it would come to 5.3? A. No; .53.

Q. Oh, .—I am sorry, .53 miles; .553, is that right? A. .53 miles.

Q. A little less than six-tenths of a mile? A. Yes.

Q. Now, the vessel struck the bridge at what hour? A. At 1557 hours.

(120) Q. Then the vessel from that point traveled from 1553½ hour position, north of the Skyway, to the Lincoln Highway bridge in 3½ minutes, is that right? A. Yes.

* * *

Appendix A

Q. What was the average speed of the vessel in knots during this 3½ minutes immediately prior to striking the bridge? A. Nine knots.

Q. Nine knots? A. Nine knots.

Q. You traveled the 3½ minutes from 1553½ to (121) just before the Skyway at nine knots? A. Yes, from these positions in 3½ minutes.

Q. And the distance from 1540 down to 1553½, you traveled about 3.42 knots? A. Yes.

Q. And from the position north of the Skyway to the position before the Lincoln Highway bridge, you were doing nine knots? A. Yes.

Q. And a vessel of this size maintains steerageway at this speed for a distance of a mile? A. At what speed?

Q. At the 3.42 knots? A. Yes.

Q. Did you testify before that to maintain speed it had to be about four and a half or five knots to keep its steerageway? A. Yes.

Q. Can you do it at 3.42 knots? A. The point at issue here is—

Q. Please answer my question.

The Court: Can you do it at that speed?

A. Yes.

Q. At 3.42 knots instead of, as you testified before, (122) at five knots, four and a half to five knots, to maintain steerage? A. Yes.

Q. You testified a few minutes ago about the minimum speed for navigating this type of channel. What was that? A. About four and a half, five knots.

Q. You have also testified in your judgment the vessel's average speed from 1540 hours to 1553½ hours was how many knots? A. Three point four knots.

Appendix A

Q. When I asked you before, your calculations, you said, about six knots. Do you recall that? A. Yes.

Q. And your calculation was much less then, wasn't it; it was three? A. Yes.

Q. Point— A. Four two.

Q. Now, you have indicated that its actual average speed during this time was 3.42, right? A. Yes.

Q. Instead of the six knots that you estimated before. Now, you have testified that, in your judgment, the vessel's average speed from 1553¼ hours to 1557 hours, when it struck the bridge, was about six knots, is that right? A (123) maximum of six? A. Yes.

Q. You have calculated that its actual average speed during this time was how many knots? A. Nine knots.

• • •

Recross examination by Mr. D'Auria:

• • •

Q. Now, coming back to your position of the Skyway— do you need the map again? The Skyway, and I think Mr. McCarter could bear this out, the Skyway to the Lincoln Highway bridge was about five-tenths of a mile? A. Yes.

Q. About half a mile. Using your figures, you were a ship's length away from the Skyway, 440 feet, which we said was about a tenth of a mile, which would make that six-tenths of a mile away, is that right? A. Yes.

Q. That you were. Now, will you calculate that speed in 3½ minutes at six-tenths of a mile? A. 10.20.

Q. 10.20. So that is different than your calculation of nine knots before? A. Yes.

(143) Q. Is that right, 10.20? A. Zero.

Q. So we can safely say in 3½ minutes that the Lembulus

was doing north of the Skyway to the Lincoln Highway between nine and 10.20 knots? A. Yes.

Q. Which is almost the speed you would do in the open ocean, isn't that right? A. Yes.

Mr. D'Auria: No further questions.

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WALFRID WAXIN, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Julian:

Q. What is your address, Captain Waxin? A. 539 85th Street in Brooklyn.

Q. What is your occupation? A. I am a tugboat captain.

(146) Q. Who is your employer? A. Moran Towing and Transportation Incorporated.

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Q. On December 20, 1957, I understand you were employed by Moran Towing, is that right? A. That's right.

Q. What was your tug, the name of your tug? A. The name of the tug that I was on at that time was the (147) Kathleen E. Moran.

Q. Do you remember on that day assisting and undocking the Lembulus? Did your tug assist in the undocking of the Lembulus? A. The tug did assist in undocking the Lembulus.

Q. That was at Kearny Point? A. At Copper's Coke is the departure point.

Q. Well, after the Lembulus was undocked and proceeded seaward down the Hackensack River, would you tell us what your tug did? What did you do with your tug? A. After the ship was turned around and headed down-

stream, we followed the ship down toward the Pulaski Skyway and Lincoln Bridge.

Q. On that trip down the Hackensack River, was there a collision? A. Yes.

Q. What time was that collision? A. I have a notation that it is 1555 in my little book.

Q. You mean you used something to refresh your recollection? A. Yes. I have a notation of it in my little day book.

Q. Would you produce that, please.

Captain, what is that document that you have in your hand? A. That is a diary.

(148) Q. Your personal diary? A. That is my personal book.

Q. And from that diary—when did you write that entry in there? A. That entry is written on Friday, December the 20th, in 1957.

Q. The collision that you refer to and mentioned as being at 1555, was that the Lincoln Highway bridge?

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Q. Just before the collision, had you seen the bridge rising, going up? A. Yes, I had.

Q. Will you tell the Court what you saw? A. I saw the bridge start to rise to what appeared to me to be in the usual fashion of bridges rising. Then to slow down to such an extent that it was hard to tell whether the bridge (149) was still rising or had stopped.

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Q. As you followed the Lembulus down, could you see her propeller as it turned? A. Yes.

Q. Would you tell the Court what, if anything, you saw the propeller do? A. Well, as we approached the bridge,

it was evident that the opening procedure was slowing down. I noticed that the wheel of the Lembulus went into reverse. At that time, we went by the starboard quarter and up alongside of the Lembulus (150) on the starboard side.

Q. Well, at that time when you saw the wheel go into reverse, would you estimate in the same fashion as before, for the Court, how far away was the Lembulus at that time? A. Well, I would say that was just about the time or shortly after; so it must be just perhaps a little bit less than boat-length, say 350 feet or so.

Q. Did you observe the speed of the Lembulus as she approached the Lincoln Highway bridge? A. At that time, it seemed to me moving very slowly, but I wouldn't guess any actual speed.

Q. Well, from your experience as a pilot, and a tug-boat captain, would you say there was anything unusual about the speed of the Lembulus as she approached the Lincoln Highway bridge? A. Not at all.

The Court: How far out of water was her screw at the time you noticed it going in reverse?

The Witness: I don't know, your Honor, whether the screw was out of the water or not. I just noticed the commotion of the water.

Mr. Julian: Your witness.

Cross examination by Mr. D'Auria:

* * *

Q. No, sir, when did you first meet Mr. Julian? A. When did I first meet Mr. Julian? I think Mr. Julian called me on Thursday of last week.

Q. Thursday of last week? A. Yes.

(152) Q. What date was that so we may—

The Court: That should be—

Mr. D'Auria: The 27th, I think, of April.
The Court: April 28th.

Q. April 28th. And Mr. Julian called you on the telephone? A. No, I called Mr. Julian.

Q. Where did you call Mr. Julian? A. Moran's office had asked me to do so.

Q. Who in Moran's office asked you to do so? A. Actually, I think it was Mr. Joe Mesig.

Q. And what is Joe Mesig in your organization? A. His duties are pertaining to damages.

Q. Damages to what? A. Equipment.

Q. Of the Moran Tugging? A. Moran's tugs, yes.

Q. Not with the Lembulus? A. No.

Q. How long before you contacted Mr. Julian were you told by Mr. Mesig to call Mr. Julian? A. I don't recall. It might be two days.

Q. Two days before April the 28th? A. Yes.

(153) Q. And what were you told to do by Mr. Mesig, to call Mr. Julian? A. Please repeat the question.

Q. What were you told to do by Mr. Mesig when you called Mr. Julian? A. I was told Mr. Julian would like to speak to me regarding the Lembulus, in connection with the Lincoln Highway bridge, and asked if I knew anything about that.

Q. And what did you say? A. I said yes, I recall it.

Q. And what did you tell him you recalled? A. The fact that the Lembulus hit the highway bridge and bent the mast.

* * *

Q. Who was the other captain of the other tug? A. I don't know.

Q. Do you have it in that diary? A. No.

Q. You don't know who worked with you on that day on the other tug? A. That's right.

Q. You were in court yesterday and today. Do you recall the name of the pilot that was aboard the Lembulus? A. Yes, Captain John Bassett.

Q. But you can't recall who worked with you that day? A. No.

Q. You say you were following the Lembulus, is that right? A. That is right.

Q. You were astern. How far astern were you? A. A safe distance so we wouldn't be sucked into the wheel or the current of the wheel.

Q. What is the safe distance, sir? A. Well, a hundred feet.

Q. About a hundred feet behind? A. Or more.

Q. Behind the Lembulus? (155) A. Or more.

Q. How high out of the water was the Lembulus? A. Pardon me?

Q. How high out of the water was the Lembulus? A. I don't recall.

Q. Well, your tug sets very low. How high out of the water is your tug? A. The tug that I was on, the pilothouse is about—the top of the pilothouse is about fifteen feet above the water.

Q. About fifteen feet? A. That is right.

Q. But you can't tell me how high the Lembulus is? A. No, sir.

Mr. Julian: What part of the Lembulus are you referring to?

Mr. D'Auria: The stern, sir.

Mr. Julian: You didn't say so. Would you amend your question?

Appendix A

Mr. D'Auria: He said he was behind, sir, and I don't know being any other place.

Mr. Julian: You can see the mast.

Mr. D'Auria: How high above the water was it?

Mr. Julian: You can see the mast, the bridge.

Mr. D'Auria: Counsel is prompting the witness, sir.

(156) Mr. Julian: I am not prompting the witness.

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Q. How high out of the water was the stern of the Lembulus? A. I don't know.

Q. But you can remember you were about a hundred feet, more or less, behind, is that right? A. That is right.

Q. And you are only sitting about fifteen foot out of the water. Where were you, in what part of the tug were you on that day? A. The pilothouse.

Q. So, therefore, you had to look out through a glass partition? A. That is right, unless the window was open.

Q. I don't know; was it open? (157) A. I don't know.

Q. You don't recall that either? A. No, sir.

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Q. And you don't know whether the bridge stopped at all? A. No.

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Q. How long did it take you from the 150 feet, more or less, that you were, to get up to that right side of that vessel? A. I don't know.

Q. Why did you make the maneuver. A. To be where I could see the pilot and be of assistance to him if he should want me

Q. But he didn't call for any assistance from you, did he? A. No.

Q. What did the other tug do, if you remember? A. I don't know.

Q. You don't know what they did? A. No.

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Q. Did you make any report of this incident to your company? A. No.

Q. Did you enter it in your log? A. I don't know.

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Q. Now, you spoke to Mr. Julian on the telephone, is that right? A. That is right.

Q. What was your conversation with Mr. Julian? A. Please—

Q. What was your conversation with Mr. Julian over the (164) telephone? A. Mr. Julian, as far as I can recall, asked me if I recalled being on the job with the undocking of the Lembulus from Copper's Coke on the 20th of December, 1957.

Q. What did you say? A. I replied. I believe, that I remembered such a thing, but that I had to look up the date. I wasn't too sure about the date.

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Q. Now, what position was your tug in when you left the Copper's Coke Wharf? A. I don't recall it.

Q. You don't recall what position you were in? A. No.

Q. Do you recall what you did with the Lembulus at (171) that point when you took it away from the wharf? A. No.

Q. You don't remember the position you were tied up in? A. That's right.

Q. Can you tell us what you did with the Lembulus then, what your part was with the Lembulus at Copper's

Wharf? A. Our part was to assist in unlocking the Lembulus. Just exactly how this was done, I don't recall.

• • •

Q. How many times have you undocked a vessel from Copper's Wharf? A. Dozens.

Q. Do you recall what position your tug was in when the Lembulus was going through the Lackawanna Bridge? A. No.

Q. You don't recall? A. No.

Q. Your job, you say, was to undock the Lembulus right (172) from the wharf? A. That's right.

Q. So it can continue down under its own power? A. That's right.

Q. You recall whether or not you had tied up to the Lembulus or whether you were just pushing, as they say, nosing it out? A. I don't recall.

Q. Do you recall if you were behind the Lembulus when it was going through the Lackawanna Bridge? A. No, I don't recall.

Q. Do you recall if the Lembulus went through the Lackawanna Bridge stern-first or bow-first? A. I don't recall.

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Q. And you don't recall whether or not the Lembulus on that date, at about 3:29, as to which way it went through the Lackawanna Bridge, whether it was the bow or the stern? A. I don't remember it.

Q. And you don't remember how you went through the bridge? A. No.

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[*Excerpts from Deposition of C. Peschken, Read into Record.*]

"Q. Now, will you tell me whether or not at the time of the approach of the Lembulus on December 20, 1957, you at any time gave it three blasts of the siren signal? A. No.

Appendix A

Q. Can you give me a reason why you did not give it pursuant to this rule that I have just quoted? A. They accept that as a signal for them to come ahead, and I have never yet had cause to give three signals for a boat to come ahead until I thought he had clearance, for the simple reason you never know when your electrical power is going to be bad. It is a safety precaution why I do that.

Q. Well, then you rely on your personal judgment as to whether a three-blast signal should be given, is that correct? A. Exactly.

Q. Your judgment is based on your personal observation of what is going on, is that right? A. That's right.

Q. Now, in this particular case, what did you (190) observe that made you determine not to give the three-blast signal? A. I didn't observe anything. I couldn't see him, but I knew he was awful high so he wouldn't have got the signal until I was all the way up."

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"Q. Can you tell me whether your bridge had reached the nearly open limit by the time of the impact of the Lembulus? A. No.

Q. It had not reached it? A. No."

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"Q. Now, it goes on to say, 'If it appears that the nearly open limit will be required then the bypass shall be used and the stand raised to the fully open limit.'

Frankly, I am not too clear on what that means. Can you tell me what that means? Can you tell me what that (192) means? A. You come back to normal, to neutral with your control, control mechanism. Then you start over again, but you can only go to a certain speed up to the fully open position. That is 100 feet.

Q. Now, did I understand it then, that under— A. You have got to stop at that particular—that nearly open limit. You have to stop there.

Q. I get it. A. She automatically stops. Then you have to start from scratch in order to go them few feet further.

Q. And, as you recall, that is somewhere in the neighborhood of ten additional feet, is that right? A. Somewhere in that neighborhood. I don't recall exact.

Q. I suppose we can find that out somehow or other. Well, now, when you have reached the nearly open limit and have come to the stop, the automatic stop which that requires, has the counterweight come down far enough to obscure window A on your sketch, P-4? A. Yes.

Entirely obscures it? A. Yes."

William G. Hagen, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Sir, will you give your full name? A. William G. Hagen.

Q. And your address? A. 44 May Drive in Berkley Heights.

Q. New Jersey, is that? A. Berkley Heights, New Jersey.

Q. Sir, do you hold a pilot's license? A. Yes, sir.

(201) Q. Can you tell me for what area that license is? A. Just all of New York harbor, all of New York harbor.

Q. Does that include the inland waterways and the Hackensack? A. Yes, sir.

Appendix A

Q. Sir, I am going to ask you to identify these pieces of paper that I hand you. A. That is the pilot order for the day I was—

Q. Speak loud enough so his Honor—his Honor has to hear you. Face him when you speak. A. This is the pilot order for the day that I was aboard this vessel, the Lembulus.

Q. Does it state the date on there, sir? A. Yes, sir, 12/20.

Q. Now, what is the second piece of paper? A. That is a bill for the piloting service from Copper's Coke to Stapleton.

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Q. Now, sir, you have been to Copper's Coke before, is that right? A. Yes.

Q. And you have gone up and down this channel before December 20, 1957, is that right, sir? A. Yes, sir.

Q. Now, have a seat. Oh, first, will you tell me the first bridge, or the first bridge going south from Copper's Coke? A. The Delaware-Lackawanna Bridge, right here.

Q. Now have a seat. On December 20, 1957, you received orders to board the Lembulus, is that right, sir? A. That's correct.

Q. Tell us how you boarded the Lembulus, please. A. I rode up on the Moran Tugboat with Captain Bassett. (205) They offered a passage to pilots going to remote docks like that.

Q. So you rode up with Captain Bassett and you boarded the Lembulus where? A. At Copper's Coke.

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Q. I show you P-6, known as the engine movement book, (207) and ask you to start at page 21, and look at it from

1529½, under the part known as engine movement, down to the same time that I asked you to look at the previous book.

Now, sir, when you boarded the Lembulus up at Copper's Coke, where were you; in what part of the vessel were you? A. I was on the bridge.

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Q. Do you recall what movement of the vessel was made before it went through the Lackawanna Bridge? A. As I recall, I believe the ship was turned above the Lackawanna Bridge.

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Q. Do you recall the weather that day on December 20, 1957, at about 3:30? A. It wasn't too nice a day, as I recall.

Q. In other words, would you say it was a day that it rained? A. Yes, sir.

Q. Did you notice anything about the channel at all, (209) whether it was rough or otherwise? A. No, I can't recall. I mean, it probably wouldn't be rough there in that area.

Q. A you went downstream, do you recall if you remained in the bridge of this vessel? A. Yes, I was on the bridge.

Q. As you approached what we call the Lincoln Highway or Hackensack River bridge, do you recall any unusual movements of that bridge? A. Well, it's a slow bridge to begin with, but, as far as I can recall, she went up but slowly.

Q. Do you recall the bridge, or have you ever seen the bridge, stop? A. No, I can't remember.

Q. Do you recall the foremost mast of the vessel striking the bridge? A. Yes, sir.

Q. Meaning the Hackensack and Lincoln bridge? A. Yes.

Q. You do recall that? A. Yes.

Q. Can you tell me, if you can after the foremast struck the Lincoln Highway bridge, what happened? A. You mean the—

(210) Q. Aboard the vessel. A. Aboard the ship?

Q. Yes. A. Well, it continued through the bridge, I believe, because we hit the main mast.

Q. Did you notice what occurred on the deck of the bridge? A. Some rigging fell down, I believe.

Q. After you went through the draw of the bridge, after the foremast struck the bridge, how far down did the vessel continue before you took over? A. I believe we left Captain Bassett off down near the Bayonne Bridge.

Q. And then—

The Court: That is Kill Van Kull?

The Witness: Yes, sir.

Q. You helped to pilot then to Stapleton, Long Island? A. I took the con then. I relieved Captain Bassett.

Q. Therefore, you never completed your mission aboard that vessel? A. That's correct.

Q. To take her out to the ocean? A. Yes.

Q. After you arrived at Staten Island and the vessel, I (211) imagine, was docked, did you leave the vessel? A. Yes.

Mr. D'Auria: No further questions.

Cross examination by Mr. Julian:

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Q. As a matter of fact, Captain, you really have no personal recollection today that you could swear to under oath as to how that Lembulus left Copper's, do you? A. Well, I think—almost every ship I have been on has always turned

off the deck and gone head down through the (214) bridges.

Q. That is because you are relying upon what has usually happened, isn't that it? A. I think it would be rather unusual if she went through stern-first.

* * *

The Court: Now, the vessel, I take it—how long was she?

Mr. Julian: 445 feet, if I remember correctly.

The Court: Now, assuming that, the width of the channel, as you estimated it, opposite the wharf, would you undertake to turn this vessel in a channel of that width at that point?

The Witness: This is off the Copper's Dock?

The Court: Yes.

The Witness: Oh, definitely, yes.

The Court: You could do it?

The Witness: Yes.

The Court: I just wanted to know.

Mr. Julian: No further questions.

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HERBERT A. SMITH, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Smith, your full name and your address, please. A. Herbert A. Smith, 403 41st Street in Union City.

Q. Mr. Smith, you are employed by whom? A. Lackawanna Railroad.

Q. Speak loud enough. A. Lackawanna Railroad.

The Court: Mr. Smith, I am the one that has to decide this case, so I want to hear you.

Appendix A

(219) Q. Mr. Smith, on December 20, 1957, at about 3:30, were you employed by the Lackawanna Railroad? A. I was.

Q. In what capacity were you employed? A. Bridge tender.

Q. And at what bridge were you employed at that day, were you working? A. Lower Hackensack Bridge, Duffield Avenue, Jersey City.

Q. Now, would you say that that is close to the Copper's Wharf, what is known as Copper's Wharf? A. That's right.

Q. And this bridge is over the Hackensack River? A. Right.

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(220) Q. Do you have your log book with you, sir? A. I have.

Q. Would you tell the Court at what time you opened that bridge for a vessel known as the Lembulus? A. It was at 3:24 p.m., December the 20th.

Q. Now, before you opened the bridge for the Lembulus, did you observe what this vessel did before it went through your bridge, through your draw? A. She has to go up to a turning point at the end of the Public Service building in order to turn the ship, to have the bow facing—going south, going south.

Q. Did, in fact, that happen? Did you actually observe it? A. Yes, they turned it.

Q. At what time did the vessel, the Lembulus, go through your drawbridge? A. Well, I cleared him at 3:42 and at 3:48 he cleared me.

Q. Were there any other boats with the Lembulus? A. There was two tugs, Pauline and the Margaret Moran.

Q. Are they all logged in your book? A. Right.

The Court: When did the Lembulus clear, did you say?

The Witness: It was 3:42 to 3:48, I was closed.

Q. And the Lembulus went through your bridge bow-first? (221). A. Right.

Mr. D'Auria: No further questions.

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JOHN P. FALLON, called as a witness in behalf of the defendant, having been first duly sworn, (226) testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Fallon, your full name and address? A. John P. Fallon, 138 Duncan Avenue, Jersey City.

Q. Mr. Fallon, you are employed by the Lackawanna Railroad? A. Lackawanna Railroad.

Q. And on December 29, 1957, were you employed by the Lackawanna Railroad? A. Right.

Q. At about 3:30 p.m.? A. Right.

Q. Where were you employed, in what position? A. I am employed at the lower Hackensack drawbridge over the Hackensack River.

Q. Is that near the Copper's Coke Wharf? A. That is near the Copper's Coke.

Q. And on that day, at 3:30, December 20, 1957, do you recall the Lembulus going through your draw? A. Right.

Q. Do you recall the time? A. Yes, sir.

Q. What time was it, sir? A. Why, we were up 130 feet at 3:42, and we were closed at (227) 3:48.

Q. Can you tell us in what manner the Lembulus went through your draw? A. Well, in that six minutes.

Q. Did it go through bow-first? A. Box-first.

Q. Did you observe it when it went up the channel? A. That's right.

Q. What did you observe when it went up the channel? A. I observed she pulled away from the dock, the bow of the boat was headed north; so they had to turn her around to bring the bow facing south, to go through the channel of the bridge.

Q. Do you recall at any time any vessel going through stern or backwards through your bridge?

Mr. McCarter: I object to that question about any vessel. Not in issue here at all.

The Court: Objection sustained on direct.

Mr. D'Auria: No further questions.

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JOSEPH CURRAN, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Curran, are you employed by the Pennsylvania Railroad? A. I am.

Q. On December 20, 1957, were you employed by the Pennsylvania Railroad at about 3:30? A. I was.

Q. Were you on duty? A. I was.

Q. Where? A. On the Hackensack Bridge, Jersey City.

The Court: That is the Pennsylvania Railroad Bridge?

The Witness: Pennsylvania Railroad Bridge.

Q. Do you have your log with you? A. I have my log sheet.

Q. Do you recall on that day what time you opened up (230) the draw of your bridge for the Lembulus? A. The bridge was opened at 3:45 and the ship arrived at the

bridge headed through the bridge at 3:48. The bridge was closed for rail traffic at 3:51.

Q. And do you recall whether or not any other boats passed with the Lembulus? A. There were two tugboats, two Moran tugs.

Q. Now— A. One alongside and one following.

Q. Do you record the name of the vessels that go through? A. We do record them. I have it on my sheet here. S. S. Lembulus.

Mr. D'Auria: No further questions.

Mr. McCarter: No questions.

The Court: No cross. Step down, please.

Canolius Hines, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Hines, where do you live? A. 243 South Burnett Street, East Orange.

Q. Whom are you employed by? A. State Highway.

Q. State Highway Department? A. Yes.

Q. In what capacity are you employed? A. Gate attendant.

Q. On December 20, 1957, about 3:30, were you employed by the State of New Jersey on that day? A. Yes, I was.

Q. Where were you assigned? A. Hackensack River Bridge, Lincoln Highway.

Q. What were your hours that day? A. Four to twelve.

Q. Do you recall the Lembulus going up the Hackensack River going north that day?

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Q. On that day, do you recall whether it was going down the river, south? A. Yes. South.

Q. Speak up. (232) A. Yes.

Q. You do recall it? A. Yes.

Q. Will you explain to the Court just what your duties are? As a gate tender on that bridge? A. To lower the crash gate and close the barrier gate, observe all traffic, river traffic, to advise the operator in charge of an opening or anything unusual.

* * *

Q. After you notified the operator that the steamer was coming, what did you do next? A. I went downstairs.

Q. Then what did you do? A. Stood by for the signal from him to lower the crash gate and close the barrier gate.

Q. Did you do that? A. Yes.

Q. Did you receive the signal—when did you receive the signal from the operator to do that? A. Do you want the exact time?

Q. No. You notified them that there was a vessel coming? A. Yes.

Q. Then you say you went back downstairs. When did you receive the signal from the operator to do your job to go out and close the gate? A. Momentarily. I can't say exactly how many minutes or anything.

Q. After you closed your gates, were the gates on the other side close at the same time that you are performing your (235) duties? A. Yes, we work as a team in sequence.

Q. After all traffic was stopped, did you give a signal to the operator that all traffic is stopped? A. No. He has indication upstairs on his own board that the traffic has stopped.

Q. And that all gates are closed? A. Yes.

Q. What position do you take after the gates are closed?

A .On the turtleback which is—it's a divider for the highway, and I notified the operator that he can start to go up.

Q. Did you hear a whistle from the boat, from the vessel? A. A whistle?

Q. Yes. A. Yes.

Q. You did hear it blow? A. Yes.

Q. Did you hear the whistle given by the bridge tender, the bridge operator, rather?

Mr. McCarter: I object to that. There is no foundation laid for that question.

The Court: Why not?

Mr. McCarter: We said, "Did you hear the whistle." (236) We haven't laid a foundation that there was one.

The Court: I will overrule the objection. Did you?

Q. Answer. A. Yes.

Q. All right, how many blows of the whistle did the bridge operator give? A. Two.

Q. Now, after the two whistles, did you observe the bridge moving? A. I don't understand the question.

The Court: You mean the draw section, don't you?

Q. The draw section of the bridge, did it start to move; did it rise? A. Subsequently.

Q. Your gates are closed. You went back to your position and you heard the boat vessel whistle, and you heard the bridge whistle, too. What did you observe then, did the bridge rise? A. Yes, it started to rise.

Q. It started to rise? A. Yes.

Q. While the bridge was going up and you were—were you observing the vessel? A. Did I observe the vessel?

Q. Yes. (237) A. Yes.

Q. What did you observe about the vessel? A. That it was moving very fast.

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Q. After you observed this vessel moving, as you said fast, what did you do? A. I went upstairs and I spoke to the operator in charge. I told him that this steamer seemed to be coming damn fast.

Q. Those are the words you used? A. Yes.

Q. What did the operator do, do you remember? A. Nothing. There is nothing he could do. He just looked at me and I went back downstairs to my post.

Q. Did he give another signal? A. He blew twice.

Q. After you told him that? A. "Bah, hah."

Q. That the vessel was going damn fast? A. Yes.

The Court: How long after you had informed the bridge (238) operator that the vessel was coming fast did he blow the two blasts, the second of the blasts.

The Witness: Momentarily.

The Court: You mean by that within a moment after that?

The Witness: Yes, that's right.

Q. You went back to your position, is that right, after you warned him about that? A. Yes.

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The Court: Can you tell us, while you were going downstairs, whether the bridge was continuing to rise?

The Witness: Yes.

The Court: So that the vessel was approaching and the draw section of the bridge was continuing to rise, is that correct?

The Witness: That's right.

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Q. As his Honor asked you, you observed the bridge rising. Did the bridge stop, that you know of? A. No.

Q. It did not? A. No.

Q. Did you see the vessel with its foremost mast collide with the bridge? A. Yes.

Q. Did you see the main mast, which is about 200 feet back from the foremost mast, strike the bridge? A. No.

Q. Did the bridge stop at any time during this period of time it was first struck by the foremast of the vessel? A. No.

* * *

Q. Now his Honor just asked you if you know about where, when you got back downstairs after you warned the operator, as to the speed going damn fast; was it below the Skyway or was it at the Skyway, do you recall that, in that location; not exact, but where? A. He was below the Skyway.

Q. When he received the second warning of the two blasts? A. That's right.

Mr. D'Auria: No further questions.

Mr. McCarter: No questions, sir.

FRED W. BENTS, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Your address, Mr. Bents? A. 816 Columbia Avenue in North Bergen, New Jersey.

Q. Mr. Bents, you are employed by the State of New Jersey? A. Yes, sir.

Q. In what capacity? A. Bridge attendant, grade one.

Appendix A

(241) Q. On December 20, 1957, Mr. Bents, between 3:30 and 3:54, what bridge were you assigned to? A. Hackensack River bridge.

Q. Is that the Lincoln Highway? A. No.

Q. Well, it is also known as the Lincoln Highway bridge, isn't it? A. Yes.

Q. Besides the Hackensack River bridge? A. Hackensack River bridge, that's right.

• • •

Q. All right, take your seat. Did you hear any signals from the Lembulus? A. Yes, three blasts.

Q. Did you hear any given by our bridge? A. Yes, two blasts.

• • •

Q. Could you say anything about the speed of the vessel? A. I don't know. It seemed as though it was creeping up on us fast.

Q. It was? A. Yes.

Q. Did you also observe our bridge? A. Yes.

Q. While it was rising? A. Yes, sir.

Q. Did the bridge stop at any time while it was rising? A. No.

Q. Did you observe the vessel, the Lembulus, when its foremast struck the drawbridge? A. Say that again, please?

(Last question repeated by Reporter.)

A. Yes, I saw it.

Q. Now, was the bridge stil rising when it was struck by the Lembulus' foremast? (246) A. Yes, sir.

• • •

Q. The foremast and the main mast are about 200 feet apart? A. That's right.

* * *

Q. Did you see the main mast? What happened to the main mast? A. The first mast?

Q. The second—the first mast is the foremast. A. The second mast just about touched.

Q. Just about? A. The bridge.

* * *

(248) JERRY IANNACCONE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Iannaccone, what is your address? A. 15-01 George Street in Fair Lawn, New Jersey.

Q. And you are employed by the State of New Jersey, sir? A. That's right.

Q. In what capacity? A. District Electrical Supervisor.

Q. Were you notified about any electrical difficulty on the Hackensack or Lincoln Bridge? A. I was.

* * *

Q. About what time were you notified? A. Well, I can't recall exactly, but I was notified, I believe twice that there was some sort of trouble on that bridge.

Q. Can you tell us the year and the month? A. It was prior to December 20th of that year.

Q. 1957? A. That's right.

Q. Did you go to that bridge as a result of a call that (249) there was electrical difficulty? A. I did.

* * *

Appendix A

Q. Mr. Iannaccone, can you tell me just what this difficulty was and what was causing it? A. Well, at the time, I said I couldn't tell then. But now we know; and, of course, it's been corrected. It was in the control of the bridge; it was in the leveling control mechanism. The bridge has a leveling mechanism which keeps the bridge level, and if it goes out of level too much, it automatically stops the bridge.

* * *

Q. Well, as your investigation—what did you find out; how many speeds are there on the bridge? A. There are six accelerating speeds.

Q. And while the bridge was having this difficulty, what was the safe speed of the operation of this bridge? A. The safe speed?

Q. Well, I guess—I suppose full speed was safe speed, because there is no regulation telling you how fast you should operate the bridge.

The Court: Let me ask you this: did you on any occasion, when you were checking to find out what was wrong with the bridge, try it out yourself?

The Witness: Yes, I did.

The Court: And did you find that it operated through the six speeds that you mentioned?

The Witness: Yes, it did.

The Court: All right.

The Witness: On one occasion, I believe on one occasion, it acted up; but it never showed up again while I was there. That was a high speed.

Q. As a result—

(252) The Court: Let us get his answer.

The Witness: That was at high speed.

Q. As a result of your investigation, did you gain any knowledge as to what speed was a safe speed to operate this bridge without it stopping? A. Well, we found that it wouldn't happen as frequently on lower speeds.

Q. And by lower speeds, you mean what? A. About three power points.

Q. Now, you did have a conference with whomever the bridge operator was at that time? A. That's right.

Q. And have you consulted with Mr. Peschken? A. I did.

Q. And did you speak at what the safe speed was to operate this bridge? A. I did.

Q. And what speed was that? A. I told him it was best operated at the reduced speed because it wouldn't occur at close intervals.

Q. And that slow speed was what? A. Three power points.

• • •

The Court: Wait a minute. You can object to the Court's question, too, but the answer is improper, not necessarily implicit in the question. Strike the answer.

Did you, yourself, by personal tests in the operation of the bridge draw, determine that the third power point was the fastest at which it could be operated with assurance that no trouble would occur?

The Witness: I did.

(254) The Court: And that would be about how long before the 20th of December?

The Witness: Oh, I would say about two to three weeks.

The Court: And did you thereafter inform the bridge operator of your experience in making those tests which you found?

The Witness: I did.

The Court: Go ahead.

Appendix A

By Mr. D'Auria:

Q. How fast is that point three? What percentage is that in relationship to the full speed, to six? A. Between 35 and 45 per cent of full speed.

Mr. D'Auria: No further questions.

Cross examination by Mr. McCarter:

• • •

(256) Q. Do you know whether or not any report was made to the Coast Guard as to this potentially dangerous situation on your bridge? A. We didn't think it was dangerous.

Q. So far as you were concerned, you were the person who has the responsibility, I take it, of making that decision? A. That's right.

• • •

Redirect examination by Mr. D'Auria:

• • •

Q. Did you have a conference with anyone, any other person, other than Mr. Henderson, who was your superior?

Mr. McCarter: When, please?

Q. During the time of this electrical difficulty with the bridge. A. Yes, I did.

• • •

Q. Did you have it before or after the accident? A. Before.

Q. And who was that with? A. The bridge designers, the people that designed the span.

Q. And did they give you any assistance in this? A. Well, they were puzzled as to what was happening also, until I proved to them what was happening.

Q. What was happening, Mr. Iannaccone? A. Well, in order to explain this fully, we'd have to go into great detail. But to give you the gist of it, this type of a bridge, a vertical lift bridge, is suspended from the counterweight by ropes. In other words, there is two counterweights and the rope attached to the counterweights, and they (263) go over sheave wheels, and they are fastened to the span.

Well, this trouble was caused primarily due to the slippage of the ropes around the sheave wheels. In other words, all the switches, limit switches, were fixed in one box, but no one ever dreamed that the ropes, these sheave wheels, would slip around there and put our limit switches out of adjustment. That was the cause of this trouble that we had.

* * *

Q. And that happened at what speed? A. It happened at high speed.

Q. And as a result of that, then, that's the time you had your conversation with the bridge operators about the low speed? A. That's right.

Q. And to operate it at that speed three, which was a safe speed? A. That's right.

Q. Did you receive any complaints at that speed that anything was happening to the bridge? A. No.

Q. What are your responsibilities in your position, your duties? A. I have a great many responsibilities. I have the responsibility of all the electrical installations in the counties of Bergen, Passaic, Essex, Hudson, parts of Union and parts of Middlesex; all the electrical installations, including traffic signals, drawbridges, movable draw-

bridges, highway lighting, street signs; anything electrical in that area.

• • •

Q. But what do you actually do? How many men do you supervise? A. Well, I supervise about 35 men.

• • •

Recross examination by Mr. McCarter:

Q. Did you get any help from the bridge designers in repairing this defect? A. No.

Q. Did your staff take care of repairing it? A. That's right.

Q. Any work requisition of any kind made for that work? A. Well, I believe there is parts that we purchased to correct this, the record of parts we purchased to correct it.

• • •

Q. Do you recall from whom the parts were purchased? (266) A. The specific manufacturer?

Q. Yes. A. Waldron Manufacturing Company.

Q. That is in New Brunswick? A. Yes, a company manufacturer.

Q. That is part of the Mid-Land Ross Corporation? A. Yes.

• • •

Redirect examination by Mr. D'Auria:

• • •

Q. Did you ever have any occasion to have to notify (271) the Coast Guard about the bridge not opening? A. Only when we are going to do work on the span and we

are unable to open the span, we make application for a span closure.

Q. And that is made with whom? A. That's made with the Coast Guard through my superior.

Q. Have you ever had occasion that you had to do that? A. Once or twice we have, yes.

Q. So at all times, this particular bridge, the Hackensack Bridge, you felt was safe to operate? A. I was—I did.

* * *

CHARLES PESCHKEN, called as a witness having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Peschken, your address, please? A. 320 Governor Street in Paterson.

Q. You are employed by the State of New Jersey. A. That's right.

Q. In what capacity? A. Chief Drawbridge Operator.

Q. What bridge are you assigned to? A. Hackensack River Bridge, Route 1 and 9.

Q. Were you assigned to that bridge on December 20, 1957? A. I was.

* * *

Q. I show you a copy of the rules that are issued by the Secretary of War, which state it was approved July 8, 1933, by George H. Dern.

Can you identify that? A. I have seen that before.

Q. You have seen these before. Do you know the rule about the sounding of the whistle as to the opening of a drawbridge? A. I do.

* * *

Q. I will read this part of the rule 4 on the reverse side of the page.

> "In case of delay in opening the draw, as is provided for in these regulations, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge."

Is that right? A. That's right, sir.

Q. As the operator of the bridge, what is the number of blasts that you usually give?

(275) Mr. McCarter: I object to that; for what purpose, when, and so on.

The Court: Yes.

Mr. D'Auria: At any time, sir.

Mr. McCarter: Under what circumstances?

The Court: We are interested in what was given this time. Objection sustained; go ahead.

• • •

Mr. McCarter: Of course, I think I can also concede —I don't want to make a big argument out of nothing here—I think I can concede safely that the rule with reference (278) to the use of two blasts as a warning signal, which was referred to by Mr. D'Auria, was, in fact, the rule in effect on the date of this collision. I don't think there is any question about that. I think that is the only important part of this.

Mr. D'Auria: That's right.

The Court: Are you willing to so stipulate?

Mr. McCarter: I'll stipulate that.

The Court: That in case of difficulty with the bridge lift—

Mr. D'Auria: Case of delay, your Honor.

Appendix A

The Court: In case of delay in getting the bridge open, a two-blast warning signal is to be given by the bridge tender.

Mr. D'Auria: That's right.

By Mr. D'Auria:

Q. Mr. Peschken, on December 20, 1957, between 3:30 and 3:54, were you given a warning or notice that the vessel known as the Lembulus was heading south to go through your draw? A. I was.

• • •

Q. As soon as they saw the vessel, the Lembulus, what did you do? (280) A. I advised the two attendants to go down, get ready to close the gates. As soon as they got downstairs, I changed the traffic lights, pushed the button to change the traffic lights. When I seen the red light up, I gave them the signal to close the gates. Immediately after, I had the lights on the board that showed that the gates were all closed. We started to open the bridge. I blew the two blasts for the ship.

The Court: Let me interrupt, if I may. You say you blew two blasts from the bridge as a signal to the ship, is that right?

The Witness: That's right.

The Court: And what purpose were those two blasts blown for?

The Witness: Possibility of a delay.

The Court: Possibility of delay. Go ahead.

Q. Now, did you hear any blast or any whistle from the vessel itself? A. When he got down close to the bridge, he blew. That was the only one I heard.

Q. The only one you heard? A. That was all.

Q. So you proceeded to start the bridge in motion, is that right? A. I did, as soon as we had the traffic stopped and the (281) gates closed.

Q. At what speed did you move this bridge? A. The third power point, as high as it went.

Q. And while this bridge was in motion on your third power, did you receive another notice from the bridge attendant? A. Yes.

• • •

Q. What notice were you given? A. Mr. Hines came running up the stairs as fast as he could and informed me that that ship was coming down pretty fast.

Q. After you were informed of that, what did you? A. I blew him down again, give him two more blasts.

Q. What did you blow? A. I blew the horn.

Q. How many times? A. Twice.

• • •

The Court: Mr. Peschken, you told us that after your first two blasts from the bridge, which you say signified or were intended to signify the possibility of delay, you heard no further blasts from the vessel until she got close. How close?

The Witness: I couldn't say.

The Court: All right.

The Witness: I could hear him then.

The Court: The second two blasts which you gave from the bridge, were they given after the blast from the vessel?

The Witness: Immediately after they give me the blast, because, at that time, is when Mr. Hines told me it was coming fast.

Q. When you were in that booth, were you observing the movement of the bridge? A. I am.

Q. Did the bridge stop at any time? A. It didn't stop at all.

Q. Did it continue to rise to its full height? A. It did.

• • •

Q. Previous to December the 20th, 1957, did you have any electrical difficulty while you were operating the bridge? A. I did.

Q. What difficulty did you have? A. The power would kick off. It would cut off altogether.

Q. And at what speed would this happen at? A. It would happen at four, five, and six power point. You could never tell definitely. I tried it at various points, after it got so that it happened frequently.

Q. Did you notify anybody about this power trouble that you were having? (284) A. Mr. Iannoccone had been notified about it.

• • •

Q. As a result of this conversation, what was the safe speed decided at to operate this bridge so that it wouldn't have a power failure? A. In view of the fact that it had never stopped, had no power failure on the third point, we decided that possibly it would have been best to operate on third point from then on until the trouble was located.

Q. Prior to December 20, 1957, you say that you have operated this bridge safely on the third power? A. That's right.

Q. And it never stopped, or the power never failed? A. That's right.

Q. Up to the time, sometime after December 20, when the difficulty was located and repaired, is that right? A. That's right.

Q. During that period of time, had you had any other large vessels, as large as the Lembulus, go through your draw? A. You mean during the time of that trouble?

Q. Yes, sir. A. We've had coal steamers going up towards—to Copper's (286) Coke.

Q. And they have had no difficulty going through your draw? A. No difficulty.

• • •

Q. Can you explain to the Court why you give two blasts before the opening of the bridge?

Mr. McCarter: That has already been covered hasn't it?

The Witness: I think I explained that to the Court.

(287) The Court: Yes, in case of delay trouble.

The Witness: Traffic conditions.

Q. And on this particular day, you did give the two blasts? A. That's right.

Q. And you again gave the two blasts when Mr. Hines notified you about the speed of the vessel? A. That's right.

• • •

Cross examination by Mr. McCarter:

• • •

Q. You told the Court that you did not see the Lembulus hit the bridge, but that you did see it when it was in the draw. Can you clear that up for us? That seems to be an inconsistency. A. When I could see him, he was clear of all obstruction that is in front of me.

• • •

Q. "A. Due to the construction of the bridge, the superstructure of the bridge, I can't see him. But when the deck is up in the air and he is practically entering the channel, then I can see the bow of the boat."

Do you remember that, sir? A. I remember that.

• • •

WILLIAM W. KUHNE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

• • •

Q. Captain Kuhne, do you have a pilot's license for navigating the Hackensack River? A. Yes, sir.

Q. Have you been up that Hackensack River, up and down as far as Copper's Coke? A. Yes.

Q. As a pilot or as a Master? A. As a Master of tugboats and mate.

Q. Sir, have you ever been a Captain or a Master pilot of a vessel as large as the one—as the Lembulus which was 445 feet long and 55 feet at the beam? A. Yes.

Q. You have? A. Yes, sir.

Q. Are you familiar with the channel, sir? A. Yes.

Q. I mean with the Hackensack River channel? A. Yes, sir.

(306) Q. Now, taking into consideration the following conditions: low tide, occasional rain, southeast wind, fresh to strong, what, in your opinion, is the minimum speed at which a vessel the size of the Lembulus could be steered and maneuvered through the channel, from Copper's Wharf to the Lincoln Highway bridge?

Mr. Julian: I have an objection to that on the ground, your Honor, that he has not stated the trim or the ballast of the Lembulus.

• • •

Q. Sir, stating that the vessel was traveling light, in ballast, was 413 feet zero aft, 17 feet aft at the time the draft—at the time of the accident was—I can't—

The Court: You had better put your joint eyeglasses on and see if you can get that correct now. The witness will be confused.

Mr. D'Auria: I better show him this part from its own log as to the trim of the ship.

The Witness: Thirteen feet forward and seventeen feet aft.

(307) Q. Now, with that—

Mr. Julian: May I ask your Honor at this time whether any wind velocity was mentioned at the time? I think he used overall expressions such as "fresh"—

The Court: I think he used fresh, southeast.

Mr. D'Auria: It was strong.

Mr. Julian: Strong southeast. Is that in your question?

Mr. D'Auria: That's right, sir.

The Court: Do you have all those facts in your question, Captain?

The Witness: Yes, sir.

The Court: Finish your question. Put your question to him having those in mind. Have you an opinion?

Q. Having all of those factors which I gave you, what, in your opinion, is the maximum safe speed for a vessel the size of the Lembulus in this position—I am sorry, at the

time—the question I gave you was the minimum speed at which a vessel the size of the Lembulus could be steered and maneuvered through the channel from Copper's Wharf to Lincoln Highway? A. Yes, sir.

Q. What was the safe speed? A. The safe speed?

Q. The minimum. (308) A. Would be about three and a half to four knots.

Q. That's the minimum? A. Yes, sir.

Q. Now, add to the conditions which I gave you before, what, in your opinion, would be the maximum speed in this channel? A. Maximum speed, I should say, would be about nine and a half, probably ten.

The Court: Maximum safe speed or maximum speed?
The Witness: Maximum speed.

Q. What would be the safe speed? A. The safe speed would be three and a half to four. Nine and a half to ten would be excessive.

Q. Would be excessive? A. Excessive.

Q. Let us assume that, in a channel of this type, under the weather and the tide conditions described previously, a vessel the size of the Lembulus made a run about a mile and a half, starting at full ahead from a previous condition of slow ahead, maintaining the full ahead condition for six minutes, what, in your opinion, would be the maximum speed of the vessel at the end of the full ahead period? A. I should say about ten knots, about ten knots.

• • •

Cross examination by Mr. Julian:

• • •

Q. Five point seven knots. Now, if a ship were going from this position at Point C, and full ahead were ordered

at this point, run for about six minutes, and there were various other engine maneuvers down to striking the bridge at 1557, taking all of that into account, would you say that an average speed of six knots between Point C and Point E is a good speed, safe speed? A. No, it's a little to excessive.

Q. In what respect, Captain? A. With respect to the closed bridge. He wasn't able to stop his vessel in due time. He was too late in recognizing that the bridge wasn't open.

Q. Who told you that? A. That's what I take for granted. He struck the bridge.

• • •

Q. Didn't you, yourself, say that, as you are approaching a bridge, it is very difficult to tell whether you are going to clear it or not? A. That's correct.

(318) Q. When should he have seen that he wasn't going to clear the bridge? A. He should have seen it by coming under the Pulaski Bridge.

• • •

Q. Can you tell from what point between just under the General Pulaski Skyway and the Lincoln Highway bridge, whether a foremast of a ship is going to clear by some ten feet? Is your eye that accurate?

Mr. D'Auria: I am going to object to this further line of questioning..

• • •

The Court: Overrule the objection.

The Witness: As a qualified pilot, which Captain (319) Bassett was, who was pilot of the vessel, under the direction of the Master of the tanker, he should have known right away, the moment he cleared the Skyway bridge, that the bridge was not open. He goes up there—or he was up there almost every day.

Q. You are referring to Captain Bassett? A. Correct.
Q. Captain—

The Court: Just a minute, Mr. Julian. I am just wondering whether he got the drift of your question.

Mr. Julian: I was getting ready to do that.

The Court: What he is referring to—you correct me if I am wrong—is your previous statement, I think in answer to a question of mine, that when you are a certain distance away from the drawbridge like that, with tall masts, it is difficult to determine at a distance whether your mast is going to pass under your bridge. Is that right?

The Witness: Yes, sir, that's correct.

The Court: Not what the qualifications of Captain Bassett were, but whether or not you, in view of what you said, were you under the Pulaski Skyway, you could be able to gauge the ability of the topmast to go through.

The Witness: That's correct.

(320) The Court: Could you?

The Witness: Yes, definitely. But I would go at a safe speed.

The Court: So if your judgment proved to be incorrect, you could—

The Witness: Stop the vessel.

* * *

Q. Assume, Captain, that her full speed, harbor speed, is nine knots, and at just prior to 1546½ that engine was slowed and stopped for the first time, the order of harbor full ahead, and run that at six minutes against the tide and with the wind against it, what speed do you think the ship would build up to at the end of six minutes? A. About nine, nine and a half.

Appendix A

Q. If her maximum speed is nine, and she is against the tide, how is she going to get up to nine and a half? A. I don't know what, against the tide or not, but even if it's against the tide, she has to make a certain speed to get through the water. When the vessel was put on full ahead, she had already had the momentum which forced her through the water. It was not from the beginning, give a full ahead from the deck.

Q. You assume that when you gave that reply? A. Yes.

The Court: Do I understand what you said now, Captain, to be in effect—and you correct me if I am wrong—that when she was given this harbor speed, she already had way on her?

(322) The Witness: She already had way.

The Court: Which made her actual movement through the water—

The Witness: Exactly, she had already been going on—I think when I looked the log over—half ahead and slow ahead, which gave her the momentum already through the water. So when they put her on full ahead, it pushed her right ahead. That's the beauty of her motor engine; that the moment you ring your telegraph, she pushes right ahead.

• • •

Appendix B

Exhibit R-4 (Peschken's Report of Accident, dated December 20, 1957)

P-6 Pilot dft 12/1/59

No Electrical Damage
J Lannacone 12/27/57

Form oEL.-3
(Old oEDM-17) Ev. 5-9-60

NEW JERSEY STATE HIGHWAY DEPARTMENT
Bureau of Electrical Operations

R-4

REPORT: ACCIDENT TO MARINE TRAFFIC AT STATE HIGHWAY DRAWBRIDGE

Make two copies. Send Original to Bureau of Electrical Operations, Trenton. Keep other for own record.

Date of Accident: Dec. 20. 1957 Time: 3.54 P.M.

Name of bridge: Route: 25M M. P.: 57.6 [illegible] 9094-60

Known as (Local name): Hackensack R. Br

Detailed description of accident:

We knew that the tugs had gone up the river for the steamer and we were watching for them

When we seen them coming I signaled the gateman to close the gates and I gave the steamer a long blast on the horn. Due to electrical trouble on the bridge this was done before the steamer reached the skyway. The span was in upward motion before the steamer was under the skyway. The span continued to go up slowly but the steamer did not slow up his speed until his aft or rear mast had hit the span. The span continued in the upward direction until all boats were clear of the span. Both forward and rear masts struck the girders under the span. The forward mast struck the girders all the way through and the rear mast after striking a couple of girders cleared the rest due to the span still going up. The tugs were not attached to the steamer. Steamer was going under its own power.

Steamer and tugs continued on. No type of river traffic very windy and raining

Identification of Tugs/Boats/Craft involved:

Boat #1	Boat #2	Boat #3
Type Oil Steamer	Type Tug	Type Tug
Name Lombulus	Name Nadine Moran	Name Catherine Moran
Owner	Owner Moran Towing Co.	Owner Moran Towing Co.
Address London	Address N.Y.C.	Address N.Y.C
Captain	Captain	Captain
Address	Address	Address
Employees	Employees	Employees

REC'D
Dept. of Law & Public Safety
DEC 30 1957
LAW DIVISION

Arrived at 1744 / 20th (Stapleton Tugs) Sailed 2010 / 23rd.

Pratique Granted

Was protest noted, if so, record when and where

Gave notice of readiness to load Time Date to discharge Time Date

Grade(s) of cargo Tons

Ship berthed ~~Port Side~~ Starboard Side ~~Name~~ Stern on to Wharf, or Number Pier 11 Time Date
Station 9s. Berth = Steel Repair Yard.

Steam supplied from shore hours minutes

Steam supplied by ship hours minutes

On arrival clock put forward / back hours minutes from sea time to shore time

On departure clock put forward / back hours minutes, from shore time to sea time

Particulars in the Port Sheet are to be filled in under the appropriate heading when applicable. Where no data are available in respect of an entry, an explanation must be given.

REMARKS.

Insert in chronological order details relating to shifting berth, working cargo, valves, lines and tanks used, etc., delays and information regarding damage to ship or cargo. Whilst not trading, particulars of docking, tank cleaning, repairs, etc., to be inserted.

Friday 20th December.

1529 All clear fore and aft, dead slow ahead, proceeding Seawards. 1537 ½ Swinging in river 1542½ ½ Swung, slow ahead proceeding downriver 1543½ Lackawanna bridge opened. 1546 Dead slow ahead, ½ ahead Lackawanna Bridge. 1555 Dead slow ahead, Stop. 1556 Full astern. 1557 Emergency full astern, fore and main topmasts struck Lincoln Highway Bridge span — see Casualty Report. 1601 Full ahead 1616 Approaching Lehigh Valley Br 1616½ Passed under Br. 1651 Changed Pilot 1754 Approaching Bayonne Br. 1734 Stop approaching Stage

J Starling Chief Officer.

Signed [illegible] Master.

p.3

K-7

ACCIDENT TO MARINE TRAFFIC AT STATE HIGHWAY DRAWBRIDGE

Make two copies. Send Original to Bureau of Electrical Operations, Trenton. Keep other for own record.

Date of Accident	Dec. 20. 1957	Time	3.54 P.M.
Name of bridge: Route	35M	M. P.	57.6 [illegible]
Known as (Local name)	Hackensack R. Br		

9094-60

Detailed description of accident:

We knew that the tugs had gone up the river for the steamer and we were watching for them

When we seen them coming I signaled the gateman to close the gates and I gave the steamer a long blast on the horn. Due to electrical trouble on the bridge this was done before the steamer reached the skyway. The span was in upward motion before the steamer was under the skyway. The span continued to go up slowly but the steamer did not slow up his speed until his 2nd or rear mast had hit the span. The span continued in the upward direction until all boats were clear of the span. Both forward and rear masts struck the girders under the span. The forward mast struck the girders all the way through and the rear mast after striking a couple of girders cleared the rest due to the span still going up. The tugs were not attached to the steamer. Steamer was going under its own power.

Steamer and tugs continued on. No type of river traffic very windy and raining

Identification of Tugs/Boats/Craft involved:

Boat #1	Boat #2	Boat #3
Type Oil Steamer	Type Tug	Type Tug
Name Lombulus	Name Audine Moran	Name Catherine Moran
Owner	Owner Moran Towing Co.	Owner Moran Towing Co.
Address London	Address N.Y.C.	Address N.Y.C
Captain	Captain	Captain
Address	Address	Address
Employees	Employees	Employees
Speed	Speed	Speed
Direction South	Direction South	Direction South
Loaded ✓ Empty	Loaded Empty	Loaded Empty

REC. Dept. of Law & Public Safety DEC 30 1957 LAW DIVISION CLAIMS BUREAU TRENTON, N. J.

Signals given by boat/s:

1	3 Blast of horn	2		3	

Signals given by bridge: 2 Blast of horn

Time bridge was clear for marine traffic: ____ A.M. / P.M.

Direction of tide: ✓ Incoming ____ Outgoing

Direction of wind: ✓ N ____ S ____ E ✓ W

Type of damage to Tugs/Boats/Craft:

Boat #1	Boat #2	Boat #3
Forward mast Broken Rear mast Bent.	None	None

RECEIVED
ELECTRICAL BUREAU
DEC 23 1957
STATE HIGHWAY DEPT
TRENTON, N. J.

Detailed description of all damage to bridge or other state property:

None that I can see

Statement of condition of damaged portion of bridge or other state property immediately before accident:

Date of this report: Dec. 20. 1957

Signature of person reporting: Mark Gilbert

Time bridge was clear for marine traffic: [ ] A.M. / P.M.

Direction of tide: [✓] Incoming [ ] Outgoing

Direction of wind: [✓] N [ ] S [ ] E [✓] W

Type of damage to Tugs/Boats/Craft:

Boat #1	Boat #2	Boat #3
Forward mast Broken Rear mast Bent	None	None

RECEIVED
ELECTRICAL BUREAU
DEC 23 1957
STATE HIGHWAY DEPT
TRENTON, N. J.

Detailed description of all damage to bridge or other state property:

None that I can see

Statement of condition of damaged portion of bridge or other state property immediately before accident:

Date of this report: Dec. 20. 1957

Signature of person reporting: Charles Tucker

Title of person reporting: Chief Bridge Operator

R4(2)

Appendix C

Letter of April 21, 1960 from Board of Commissioners of Pilotage, State of New Jersey, Annexed to Peschken's Motion After the Trial Court's Decision

Board of Commissioners
of Pilotage
Room 4200
40 Wall Street
New York 5, New York

April 21, 1960

Alfred P. D'Auria, Esq.
Deputy Attorney General
State of New Jersey Department of
Law and Public Safety
State House Annex
Trenton 25, New Jersey

Re: Collision—S.S. LEMBULUS—Highway Bridge

Dear Mr. D'Auria:

With further reference to the above matter, available information indicates that there was slack water in the Hackensack River at the time of the collision. This information is taken from the "Tide Current Charts," New York Harbor, 7th Edition, published in 1951 by the United States Geodetic Survey.

The collision occurred at approximately 1 hour and 45 minutes after low water. The tables indicate that 1 hour after low water there would be a .2 knot ebb tide, and 2 hours after low water there would be a .1 flood tide.

I hope this information will be helpful.

Very truly yours,

STATE OF NEW JERSEY
BOARD OF COMMISSIONERS OF PILOTAGE
WALTER E. MALONEY
Secretary

Appendix C

Letter of August 23, 1960 from U. S. Department of Commerce, Annexed to Peschken's Motion After the Trial Court's Decision

U. S. DEPARTMENT OF COMMERCE
COAST AND GEODETIC SURVEY
90 Church Street
New York 7, N. Y.

23 August 1960

Mr. Theodore I. Botter
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
State House Annex
Trenton 25, N. J.

Dear Sir:

This is in reply to your letter of August 22, 1960 requesting information concerning the height of tide and the strength of the tidal current at Lincoln Highway Bridge across the Hackensack River on December 20, 1957 at 3:57 P.M.

On December 20, 1957 the tides at the Battery, New York City were as follows:

	Predicted		*Observed*		*Difference Observed*
	Time	*Height*	*Time*	*Height*	*Pred.*
High Water	7:23 AM	5.3 ft.	7:54 AM	5.8 ft.	+0.5 ft.
Low Water	1:49 PM	—0.9 ft.	2:06 PM	0.0 ft.	+0.9 ft.
High Water	7:50 PM	4.2 ft.	8:00 PM	5.3 ft.	+1.1 ft.

Appendix C

The tide at Port Newark Terminal occurs 10 minutes later and the high water is 0.6 foot higher than at the Battery, if not influenced by non-tidal forces, such as wind. The above tide information is taken from Tide Tables, East Coast of North and South America, 1957, and from copies of the automatic tide gage records for the Battery furnished by our Washington Office. Height of tide is above mean low water which is 0.0 feet. Times are Eastern Standard.

Our Current Tables, Atlantic Coast, North America, 1957 list the following predicted current information for December 20, 1957.

The Narrows

	Time	*Velocity*
Maximum Ebb	12:05 PM	2.3 knots
Slack Flood begins	03:48 PM	0.0 knots
Maximum Flood	06:20 PM	1.7 knots

For Lincoln Highway Bridge, north of, the table states that the currents are 10 minutes later and have a velocity ratio of 0.5 as referenced to the Narrows. According to the predicted times slack water at the bridge was at 3:58 PM on December 20, 1957.

The above information is true according to the best of my information, knowledge and belief.

/s/ G. R. Fish
G. R. Fish
District Officer
New York District

PORT SHEET of the M/S. Lewisburn at Staten Is. Repair berth. from 20 XII 57 to 23. XII. 57

{ to commence when ship is berthed or at anchorage in port and to terminate at departure from berth or anchorage. } To be kept in local time, 0 to 24 hours.

Arrived at 1744 / 20th (Stapleton Stage) Sailed 2010 / 23rd.

Pratique Granted

Was protest noted, if so, record when and where

Gave notice of readiness to load Time Date to discharge Time Date

Grade(s) of cargo Tons

Ship berthed ~~Port Side~~ Starboard Side / ~~Stern on~~ to Wharf, or ~~Name~~ Number Pier 11 Time Date
Staten Is. Berth = Steel Repair Yard.

Steam supplied from shore hours minutes

Steam supplied by ship hours minutes

On arrival clock put forward / back hours minutes from sea time to shore time

On departure clock put forward / back hours minutes from shore time to sea time

Particulars in the Port Sheet are to be filled in under the appropriate heading when applicable. Where no data are available in respect of an entry, an explanation must be given.

REMARKS.

Insert in chronological order details relating to shifting berth, working cargo, valves, lines and tanks used, etc., delays and information regarding damage to ship or cargo. Whilst not trading, particulars of docking, tank cleaning, repairs, etc., to be inserted.

Friday 20th December.

1529 All clear fore and aft, dead slow ahead, proceeding Seawards. 1537 ½ Swinging in river 1542½ ½ Swing, slow ahead proceeding downriver. 1543½ Lackawanna bridge opened. 1546 Dead slow ahead, ½ ahead Lackawanna Bridge 1555 Dead slow ahead, Stop. 1556 Full astern. 1557 Emergency Full astern, fore and main topmasts struck Lincoln Highway Bridge span — see casualty Report. 1601 Full ahead 1616 Approaching Lehigh Valley Br 1616½ Passed under Br. 1651 Changed Pilots
H. S. L. [illegible]

Appendix E

Excerpts from Transcript of Argument on Respondent Peschken's Motion for Judgment, Notwithstanding Findings of Fact and Conclusions of Law (September 26, 1960)

Newark, New Jersey,
September 26, 1960.

Before:

Honorable REYNIER J. WORTENDYKE, JR.,
U. S. D. J.

Appearances:

MESSRS. MCCARTER & ENGLISH,
Attorneys for Libellant,
By: FRANCIS E. McCARTER, ESQ.

DAVID D. FURMAN, ESQ.,
Attorney for Respondent,
By: THEODORE I. BOTTER, ESQ.

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(2)* Mr. Botter: We have the twin motions in the Shell Petroleum vs. Peschken.

The Court: You want me to reconsider my opinion?

Mr. Botter: Yes, your Honor.

The Court: How shortly can you present the essence of your brief?

Mr. Botter: I'll try to be brief. I know the Court has had a long day.

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Appendix E

The Court: Don't worry about me. I will tell you what I wish you would do first. I wish you would demonstrate that mathematically I couldn't be right. That is the substance of what you say in your brief.

Mr. Botter: Well, yes, we think that there is error in the mathematics. One of the items—

The Court: Can you simplify that for me?

Mr. Botter: Yes. Well, I'll first deal with the portion of the evidence as relates, I'the mathematics, which is not of the evidence as relates to the easiest aspect to deal with contradicted. That will be th
first. say this: I am not concerned

The Court: Let me just sen I wrote the opnion, whether now, nor was I concerned whethe first draw or whether it this vessel backed through tfar as the movement at that came nose first, except insofad the timing of its (3) arrival stage bore upon the speed and
at certain critical points. that essentially we agree that

Mr. Botter: I'd like to say tpend too much upon the turn- the ultimate speed did not dep Lackawanna bridge and the ing of the vessel between the of the vessel north of Lack- City bridge, or the turning o it would have a little more awanna bridge, except that it ahead. If it had first been headway if it started going anna bridge, by the time we turned north of the Lackawald have already had a little went into full ahead it would had first been turned around more headway on it than if it lna bridge and then started after passing the LackawannBut the strong contradiction from a dead stop position. BCaptain Hawkins' testimony of the Master's testimony, Cned around—
on the point where it was turns credibility.

The Court: That affects his whole truthworthiness of the

Mr. Botter: Yes, and the w your Honor. The uncontra- reliability of his testimony, yas relates to the speed of the dicted phase of the evidence as

vessel concerns the last stage of this trip from the point that the vessel was marked D on this Exhibit P-2 in evidence, which was just north of the Pulaski Skyway to the point where it came in contact with the bridge. Now, this point was clearly identified by Captain Hawkins. It was he who placed the vessel here, and this is significant, (4) that the location of the vessel is with respect to a fixed object, it wasn't necessary to take bearings for the Captain to know that he was just north of the Pulaski Skyway.

Now, there is no other testimony in the record that bears upon the location and time just north of the Pulaski Skyway and the time when the collision took place, no other testimony. The Captain said that at 15:53 and a half he was at point D, and several time in the record he said it was there that he gave his signal to the bridge for the opening of the bridge.

The Court: What was that, about a half mile north of the bridge?

Mr. Botter: Yes, your Honor. It is approximately point 53 miles north of the Lincoln Highway bridge. There were two figures used for the same period of time. It was only three and a half minutes between the point just north of the Pulaski bridge and the time of the collision.

The Court: The collision was 15:57, wasn't it?

Mr. Botter: 15:57.

The Court: And this point at the Pulaski Skyway was 53.

Mr. Botter: Yes, your Honor. Now, the Captain himself admitted that going this distance .53 miles in three and a half minutes, he would have to do (5) and was doing nine knots on the average. Now, there is no other testimony in the case that tells us how fast the vessel was going between the Pulaski bridge and the Lincoln highway bridge.

The Court: Nine knots.

Mr. Botter: For the three and a half minute period to cover a distance of .53 miles. There was a recalculation made after a recess, and it was based upon the fact that the vessel may have been approximately 400 feet north of the Pulaski Skyway, and that would add a little more distance to this portion of the trip and would make it approximately .6 of a mile, and for the three and a half minutes to do that distance, the later calculation was 10.2 knots.

The Court: Instead of 9.

Mr. Botter: Yes. Now, Captain Hawkins admitted both of those speeds and calculated those speeds, and it was he who fixed the time and place. Now, to attain the speed of something between 9 and 10.2 knots we know from other testimony in the case the vessel would have to be going for a considerable period of time at its full harbor speed, and that too was testified by the Captain. Captain Hawkins said that for a period of six or six and a half minutes, from 15.46 and a half to 15.53 and a half his (6) vessel, which was lightly laden, it was in ballast, but had no cargo, was going at full ahead. He admitted that full ahead was harbor speed was nine knots, full ahead in the open ocean was 10¾ to 11 knots, and after making this calculation in this distance between the Pulaski Skyway and the Lincoln Highway bridge, the Captain admitted yes, he was going almost at full ocean speed.

We say, your Honor, that that evidence alone, without more, without the other evidence that we feel further augments our position in this case, the Master, the pilot, the operators of the vessel were negligent. They were going at a high speed.

Now, in considering the speed that the vessel was doing shortly before it struck the bridge, your Honor calculated the speed with reference to the City bridge point. There

we run into contradictions. It is true, we feel, that the overwhelming weight of evidence puts the vessel at the Lackawanna bridge at 15:46, therefore, the vessel had to make a longer distance to the Pulaski Skyway in the same period of time that the Captain said he was only going from the City bridge to the Pulaski Skyway. * * *

On that evidence alone, your Honor, we submit there is proof of excessive speed because of his important point: It is true that the engine movements between the Pulaski Skyway and the Lincoln Highway showed that the engine was not going at full ahead, it was taken off full ahead. It was dropped into half ahead, in slow and stop and things of that sort. But here is a vessel that had gotten up to full speed, had been going at full speed for a long period of time. As the testimony of both Captain Hawkins and our own expert, Captain Kuhn showed, the momentum of the vessel would be enough to maintain that speed. You don't take much away from the vessel simply by cutting the engine (8) down. Therefore, it is not of much purpose to debate the starting point and the average speed throughout the whole distance.

The clear uncontracted testimony between the point of the Pulaski Skyway and the Lincoln Highway bridge shows an excessive, grossly excessive speed. This is a narrow winding channel. It doesn't take an expert to know that a vessel does not go at close to its maximum ocean speed in a channel of this kind.

The Court: What do you mean by that statement? You mean I must assume that it didn't go at its maximum speed?

Mr. Botter: No. I mean that a layman would know that a vessel should not be driven at its maximum ocean speeds.

* * *

Appendix E

Mr. Botter: Now, if nothing else was in the case, the vessel was negligent based upon its own testimony as to its speed. Moreover, Captain Hawkins himself admitted that 3.3, or 3.5 knots was sufficient to maintain steerage way in in this channel. At first he said four or five, but then after various calculations he admitted he was at one time going three to three and a half knots, and that that was sufficient to maintain steerage way under these conditions.

Now, there is a point in your Honor's opinion that bothers us with respect to your Honor's statement relating the speeds to ground speed. All the testimony in this case your Honor related to effective speed of the vessel simply by mathematical computation, time, distance or time times 60 to get the knots.

• • •

The Court: In other words, you say I should have accepted the testimony of the witness as pertained to the rate of speed under existing conditions?

Mr. Botter: Yes. Moreover, you should not (12) have diminished from the excessive speed that we charge because of an unknown factor of the tide. Even if there was an incoming tide, let us say somewhere between slack tide and flood tide, there is no evidence to show that the tide was of any particular speed. That is to say, maximum tide in this river may have been only one or one and a half knots, which would not have been appreciable to diminish the effective speed of that vessel.

The Court: You say there is no evidence on it?

Mr. Botter: No, no one said how fast the tide was going, if it was actually coming in. For that reason and we notice your Honor had taken judicial notice of one of the maps of the U. S. Coastal Geodetic Survey, and we ask your Honor even at this time, and if this be considered for this limited purpose or request, to reopen the case to put

this evidence in since we feel it is uncontradicted and comes from a source which the Court can take judicial notice. We would like to have the Court notice that this was indeed a time of slack water and that the tide, if there was an incoming tide at all, and it would be a tide incoming by maybe ten minutes at the time of the turn of the tide, the speed of the tide was absolutely negligible at this time. Our expert so testified.

Now, we have letters which we have annexed to (13) our moving papers to show the Coastal Geodetic Survey chart with respect to the tide.

The Court: That wasn't before me at the time I wrote the opinion.

Mr. Botter: It was not, your Honor. We didn't think that the tide was that much of a factor, frankly. No one made mention of the tide as a significant factor in considering the speed of this vessel.

The Court: I have never felt the tide on the Hackensack River. I have on other rivers in New England. Of course, the tide rises and falls there at a much greater distance than it does here around metropolitan New York. But I have no right to assume one way or the other with respect to the effective tide on the speed of a vessel in ballast and of the dimensions of this one, unless I have evidence.

Mr. Botter: I would like to point out one thing further. The letters that we referred to, that we included in our moving papers, compute the various tides at different points. I think one of the points is the Port Newark Terminal. Now, on P-1, I believe, this very large map that is rolled up—

The Court: What is that, a chart?

Mr. Botter: Yes, this is the chart, Coastal (14) Geodetic Chart of the Hackensack bridges, P-1 in evidence. There is a notation here with regard to soundings in feet at mean, low water, and it shows virtually no change in low and

high water points between Port Newark and Little Ferry in the Hackensack River, which would be in the extreme north. So that for all intents and purposes we feel that the tide conditions at Port Newark—

The Court: Were the same.

Mr. Botter: With reference to these notations on this chart would be the same as at the bridge, yes. In any case, you could not have flood tide at this bridge regardless of wind conditions. Flood tide was four and a half to five hours away, your Honor. Captain Hawkins was clearly wrong—I won't say he was intentionally wrong—when he said it was flood tide, but he himself did not attribute much significance to the tide in his testimony.

• • •

The Court: Before you move to that, the nub of your contention is that the vessel between the Pulaski Skyway and the Lincoln highway bridge was traveling too fast?

Mr. Botter: Too fast based upon the only testimony in the case, because it was Captain Hawkins who placed the vessel at the Pulaski Skyway and gave the time of that position. He did so several times in his testimony. This was not an accidental point in his testimony, your Honor.

The Court: You want to object to some of his testimony and accept the rest.

Mr. Botter: Well, your Honor, I tell you our position on that. Let us assume that there is conflict in the testimony between his turning below the Lackawanna bridge or north of it, and also conflict with regard to his passing the Lackawanna bridge at 15:46 or passing the City bridge at 15:46. We feel that consistent with his testimony relating to the distance and time for the trip between the Pulaski Skyway and the Lincoln Highway we can take the

overwhelming weight of evidence in the case and fix his beginning point at the Lackawanna Bridge at 15:46. In (16) other words, if he passed the Lackawanna bridge at 15:46, the time and speeds attained from this point to the Pulaski Skyway are consistent in the evidence, the Bridge Movement Book, the deck log book and the engine movement books can explain the trip of the vessel consistently in this period. However, if you take Captain Hawkins testimony and start him with the vessel at 15:46 on the City bridge, you run into problems of getting up to a high rate of speed at this point, Pulaski Skyway, when he is only doing an average, let us say, of about three knots in the point between the City bridge and the Pulaski bridge.

In other words—

The Court: In other words, the speed does not become critical until he reaches the point of the Pulaski Skyway.

Mr. Botter: That's right. Now, we say that his testimony that is to be disregarded is important in terms of his veracity, reliability, his ability to remember, to put together these different facets of the case. We don't say disregard it because it hurts our case; we say disregard it because, first of all, it is contradicted by the overwhelming weight of credible evidence by impartial witnesses, by log, by books of the various bridge operators, you see, and contradicted by his own testimony, by his vessel's own (17) records. The bridge movement book and the deck log clearly show his position at the Lackawanna bridge at 15:46.

Now, he hit the City bridge at a later time. We asked on cross-examination if the deck log book was made up at night from excerpts from the bridge movement book, and why did you call this bridge the Lackawanna bridge when you say you had already made the notation in the

bridge movement book that it was the City bridge. Counsel interrupted—his own counsel interrupted and said, "If you know." His answer was, "I don't know." He couldn't explain that, your Honor. We feel it is not usual for an ink notation to be made in the bridge movement book, that's the only ink notation in that book, and when he came to explain why he called it the Lackawanna bridge, when a copy was later made of the bridge movement book when he claims he had already made the entry of City bridge in that bridge movement book, he couldn't explain it.

The Court: He couldn't reconcile the inked in City bridge with the Lackawanna bridge which he previously made.

Mr. Botter: Yes. The bridge movement book is made simultaneously with the events. This book is all in pencil and made by the—one of the officers on the bridge. It says right at the front of it, it must be (18) made "contemporaneously recorded in a neat and orderly manner." There is only one ink notation in this book for the day in question, and that is when he places a 15:46 the vessel at the City bridge, and he does it in the lefthand margin. He has his initials there. We don't have many opportunities, your Honor, to test the credibility of a witness. It doesn't change his speed between the Pulaski Skyway bridge and the Lincoln Highway bridge, but here is a witness who comes in with records, all sorts of letters and records, and he says we didn't know what bridge it was. Why did you put City bridge in? He said, "I asked the pilot." You will notice in one of his records the pilot, who is piloting that vessel, left at approximately 16:00 hours, left the vessel. So that some time that day he says he asked the pilot, and I would say between 15:57. I'll give you the page reference, page 9, at 16:51.

The Court: What is this, the deck log?

Appendix E

Mr. Botter: This is the deck log. On page 9, "16:51 changed pilots." That is the pilot Bassett who left, and then the pilot who came on was our witness.

The Court: Then you say that that entry in the bridge movement book, opposite which there has been the ink insertion, in ink of "City bridge," should read "Lackawanna bridge"?

(19) Mr. Botter: That's right, because in the bridge movement book made up that night from the Captain's own testimony, it was made up by taking excerpts from the bridge movement book, clearly states 15:43½, Lackawanna bridge open, 15:46 dead slow ahead, vessel cleared Lackawanna bridge. There it is, 15:46 cleared bridge. There is another part of proof that this was the only bridge they passed. The Lackawanna bridge was the one they passed at 15:46 in this bridge movement book. You will notice at page 67 that this is the first bridge noted in the bridge movement book that the vessel had approached and cleared. Now, the first bridge we know is the Lackawanna bridge. We also know that from [illegible]:29 to 15:37 the vessel, with the assistance of the tugs, was being maneuvered away from the dock. At 15:37 the vessel was swinging in the river. At that notation, 15:37, continuous swinging around in river. At 15:38 engine movement is stopped. At 15:40 vessel turned in channel. 15:41 stopped, 42½ slow ahead; vessel approaching bridge. 15:43½, slow ahead, bridge opened.

The Court: That is the Lackawanna?

Mr. Botter: That is the Lackawanna, the first bridge they encountered after they swung the vessel.

The Court: Does not that Lackawanna bridge (20) tender's log agree?

Mr. Botter: It agrees identically. It is amazing that the two clocks were synchronized. But possibly not amaz-

ing, railroad trains may not arrive on time, but I think clocks usually are accurate. But the time of the bridge movement book and the Lackawanna tender's book coincides, and amazingly again, that time also coincides with the records of the City bridge that were produced.

The Court: Were they produced?

Mr. Botter: Yes, they were, your Honor.

The Court: I didn't recall the City bridge tender's—

Mr. Botter: As a matter of fact, that is another point in which we feel there was an error in the Court's opinion. Your Honor mentioned in your opinion that it was our own bridge book that said the vessel came through between 15:42 and 15:48. But our own bridge book was not put in evidence. It was the bridge book of the City bridge that was put in evidence.

I have to clarify one point. We have throughout this case referred to the City bridge as a composite. It is actually three bridges. In other words, the New Jersey Highway bridge, which is northernmost the Pennsylvania Railroad bridge, and the Pennsylvania Railroad passenger bridge, those three have been referred to for simplification (21) as the City bridge. It was the log of one of these railroad bridges that was introduced and showed the vessel going through between those periods of time. It was not our own log.

The Court: Was that log put in evidence?

Mr. Botter: I believe it was.

The Court: Have you it there?

Mr. Botter: R-2 shows, among other things, December, 1957, the 20th of December, it says, "Lembulus tanker 3-42, 3-48."

The Court: That is Respondent's Exhibit 2?

Mr. Botter: R-2. I believe—I am sorry, I believe R-2 is the Lackawanna bridge record.

The Court: You say your recollection is that it is in evidence, the City bridge log book?

Mr. Botter: It is the Pennsylvania, sir.

The Court: Is that one of the City bridges?

Mr. D'Auria: That is alongside of the City bridge where the three bridges are together. One is the City bridge, which we call the Whipen bridge. Right after that are these two City bridges.

The Court: Pennsylvania?

Mr. Botter: R-2, as shown on page 223 of the testimony, is the log of the Lackawanna bridge. It (22) shows between 3-42 and 3-48. There was testimony—

The Court: I will review the matter. Suppose you go to your legal—

Mr. Botter: There was testimony as to the vessel clearing this bridge. I have it in my brief. I know the bridge was closed at 15:51. I remarked that that was approximately three minutes after the Lackawanna bridge was closed, and that—

The Court: 15:51 the Pennsylvania bridge was closed?

Mr. Botter: Yes, your Honor. The Lackawanna bridge was closed at 15:48. I recall in the brief noting that the times were consistent, because there was a three-minute interval for the vessel to pass that distance. But I also point out if the vessel were turned south of the Lackawanna bridge, and it took five minutes according to the engine log book and the bridge movement book, to turn the vessel, it could not have cleared this Lackawanna bridge at 15:46 and then spend five minutes in turning in the river, then starting out from dead stop position and pass the City bridge at 15:51.

The Court: *I am satisfied she turned about above, north of the Lackawanna bridge.* (Emphasis added.)

Mr. Botter: There were about eight people who (23) so testified.

I'd like to turn to the crucial point of law upon which you Honor decided the case.

* * *

Appendix E

Mr. Botter: Your Honor stated that the bridge tender was negligent in commencing to open the bridge after giving the warning signal. You felt that that countermanded the warning signal.

The Court: In effect that invited them to come ahead despite the warning.

Mr. Botter: In the first place there are no cases that we have found, and we submit none cited by your Honor, to support that proposition of law. There were two cases mentioned by way of reference with a "See" reference to the cases, the Kard and the Clement cases. In both of those cases liability was founded on the failure of the bridge tender to give any warning signal. It was not that the warning signal, plus the opening of the bridge, resulted in an invitation to come on; in those cases it was the failure to give any warning to the vessel to hold off, or any warning of possible delay which permitted the vessel to proceed through. The vessels in both cases gave the appropriate approaching signals.

• • •

The Court: There were two warning signals given from the bridge?

Mr. Botter: Yes, your Honor. But the crux of our case legally is this—and, incidentally, no one testified on behalf of the vessel to deny in any way the receipt of the warning signals, they simply said they got an answering signal, didn't bother denying that they were warning signals—

The Court: I remember that the vessel admitted it heard a blast from the bridge.

Mr. Botter: Now, we feel that the regulations are clear on the subject, that once—and the case law—a warning is given to the vessel the bridge cannot move out (25) of the way of the vessel. This bridge tender could not have

done anything further but warned this vessel, and once the warning is given to the vessel we feel that the obligation is on the vessel, in the little that I know about navigation and the rules of the road, or rules of the sea, the vessel becomes the burdened vessel. It has the obligation to hold itself off. The very case cited by your Honor in your Honor's opinion states that, that the vessel has the right to come on. It is true that it was the paramount right in navigating the river. We have to open our bridge, if we can do so. But the regulation contemplates that we might have delay, we might have obstructions and we might have mechanical difficulties. In those events our obligation is to give a warning signal. That was concededly done in this case. From that point on the vessel was at its peril in coming on, and particularly in this case in coming on at its great speed.

* * *

Mr. McCarter: * * *

Well, let us return now to the transcript, to the testimony of respondent, and the records contemporaneously made with the accident. I am forced to concede that Captain Hawkins' testimony left something to be desired by way of clarity.

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